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CASES

IN THE

COURT OF COMMON PLEAS

AND

EXCHEQUER CHAMBER.

BY

JOHN SCOTT,

OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

VOL. VII.

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JUDGES

OF

THE COURT OF COMMON PLEAS.

The Right Hon. Sir Nicolas Conyngham Tindal, Knt., L. C. J.
The Hon. Sir James Allan Park, Knt.
The Right Hon. Sir John Vaughan, Knt.
The Right Hon. Sir John Bernard Bosanquet, Knt.
The Hon. Sir Thomas Coltman, Knt.
The Right Hon. Thomas Erskine.

ATTORNEY-GENERAL.
Sir John Campbell, Knt.

SOLICITOR-GENERAL.
Sir Robert Mounsey Rolfe, Knt.

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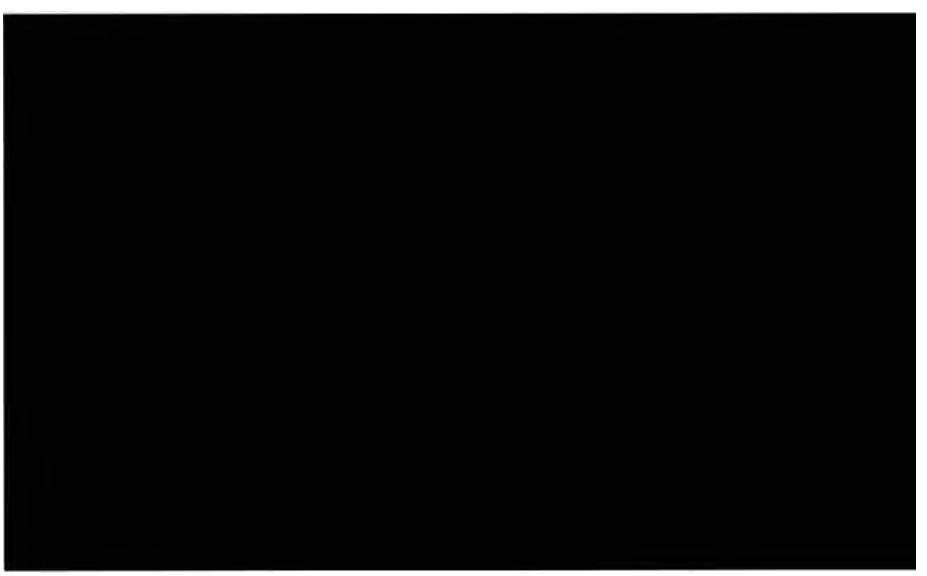
ERRATA.

Page 341, marginal note, last line but one, for "excluding," read "excluded."
—— 408, marginal note, line 4, for "drawees," read "drawers;" and line 6, for "drawers," read "drawees."



1839. ELEGIT.

victed, as appears to us of record; and afterwards the said A. B. came into our said court before us, and, according to the form of the statutes in such case made and provided, chose to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the —— day ——, in the year of our Lord ——, on which day the judgment aforesaid was entered up, or at any time afterwards, or over which the said C. D., on the said —— day of —— (1), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, according to the form of the said statutes, until the damages aforesaid, together with interest upon the said sum of £——, at the rate of four pounds per centum per annum, from the —— day of ——, in the year of our Lord —— (2), shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B. by a reasonable price and extent all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or pos-

(1) The day on which the judgment was entered up.

(2) The day on which the judgment was entered up, or, in case the judgment was entered up prior to the 1st of October, 1838, say "from the 1st day of October, in the year of our Lord 1838."

1839. ELEGIT.

C. D., or any person in trust for him, was seised or possessed of on the —— day of ——, in the year of our Lord ——, on which day the said rule was made, or at any time afterwards, or over which the said C. D. on the said —— day of —— (4), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said sum of £——, together with interest upon the said sum of £——, at the rate of four pounds per centum per annum, from the said —— day of ——, in the year of our Lord —— (5), shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B. by a reasonable price and extent all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said —— day of —— (6), or at any time afterwards, or over which the said C. D., on the said —— day of —— (6), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments

(4) The day on which the rule was made.

(5) The day on which the rule was made, or, in case it was made prior to the 1st of October, 1838, say "from the 1st day of October, in the year of our Lord 1838."

(6) The day on which the rule was made.

1839. ELEGIT.

any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £—— and £——, together with interest upon the said two several sums of £—— and £——, at the rate of four pounds per centum per annum, from the said —— day of —— (8), shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B. by a reasonable price and extent all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said —— day of —— (9), or at any time afterwards, or over which the said C. D., on the said —— day of —— (9), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said two several sums of £—— and £——, together with interest as aforesaid, shall have been levied: And in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, under your seal and the seals of those by whose oath you

(8) The day on which the costs of the rule were taxed, or, in case that day were prior to the 1st of October, 1838, say "from the 1st day of October in the year of our Lord 1838."

(9) The day on which the costs of the rule were taxed.

1839. ELEGIT.

copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said —— day of ——, in the year of our Lord —— aforesaid (10), or at any time afterwards, or over which the said C. D., on the said —— day of —— (10), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid and the said costs so taxed and allowed by our said court before us at Westminster as aforesaid, together with interest upon the said two several sums of £—— and £——, at the rate of four pounds per centum per annum, from the —— day of —— aforesaid (10), shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the said —— day of —— (10), or at any time afterwards, or over which the said C. D., on the said —— day of —— (10), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the damages aforesaid, and

(10) The day on which the costs of removing the judgment were taxed.

1839.
ELEGIT.

ditaments of copyhold or customary tenure, in your baili wick, as the said C. D., or any person in trust for him was seised or possessed of on the said —— day of ——, in the year of our Lord —— (11), or at any time afterwards or over which the said C. D. on the said —— day of —— (11), or at any time afterwards, had any disposing powe which he might, without the assent of any other person, exer cise for his own benefit; to hold to him the said goods and chattels as his proper goods and chattels, and to hold the said lands, tenements, rectories, tithes, rents, and hereditament respectively, according to the nature and tenure thereof to him and to his assigns, until the said two several sums of £—— and £——, together with interest on the said two several sums of £—— and £——, at the rate of four pounds per centum per annum, from the said —— day of —— (11) shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B. by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his oxen and beasts of the plough, and also all such lands, tenements rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any one in trust for him, was seised or possessed of on the said —— day of —— (11), or at any time afterwards, or over which the said C. D. on the —— day of —— (11), or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit to hold the said goods and chattels to the said A. B. as his proper goods and chattels, and also to hold the said lands tenements, rectories, tithes, rents, and hereditament respectively, according to the nature and tenure thereof to him and to his assigns, until the said two several sums

(11) The day on which the costs of removing the rule of the inferior court into the court of Queen's Bench were taxed.

No. 1.—Same.

proviso, cause to be delivered to him all the goods and chattels of the said C. D. in your bailiwick, except his own and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of, on the said —— day of —— 19—, or at any time afterwards, or over which the said C. D. on the said —— day of —— 19—, or at any time afterwards, had any disposing power which he might, without the assent of any other person, exercise for his own benefit; so that you the said goods and chattels as his proper goods and chattels, and all the said lands, tenements, rectories, tithes, rents, and hereditaments respectively, according to the nature and tenure thereof, to him and to his assigns, until the said three several sums of £——, and £——, and £——, together with interest upon the said three several sums of £——, and £——, and £——, at the rate of four pounds per centum per annum, from the said —— day of —— 19—, shall have been levied. Therefore we command you that without delay you cause to be delivered to the said A. B., by a reasonable price and extent, all the goods and chattels of the said C. D. in your bailiwick, except his own and beasts of the plough, and also all such lands, tenements, rectories, tithes, rents, and hereditaments, including lands and hereditaments of copyhold or customary tenure, in your bailiwick, as the said C. D., or any person in trust for him, was seised or possessed of on the said —— day of —— 19—, or at any time afterwards, or over which the said C. D. on the said —— day of —— 19—, or at any time afterwards, had any disposing power which he might, without the assent of any other

19 The day on which the writ issues into the county, or some day of removing the writ of the sheriff. Hence writs issue

1839. FIERI FACIAS.

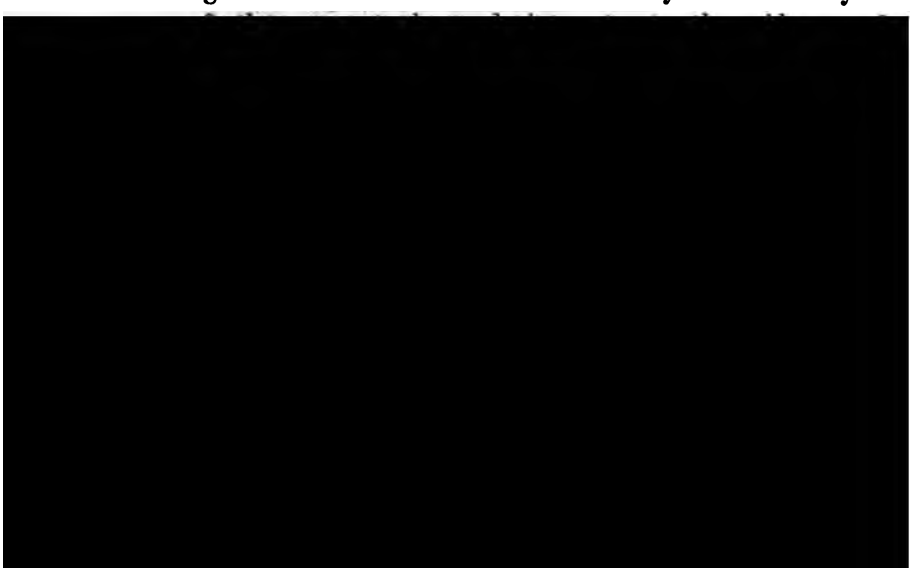
on which day the judgment aforesaid was entered up, and have that money, with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for his damages and interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf: And in what manner you shall have executed this our writ, make appear to us at Westminster, immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the —— day of ——, in the year of our Lord ——.

No. VIII.

Writ of fieri facias on an order of the court of Queen's Bench for payment of money.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of ——, greeting. We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made £——, which lately in our court before us at Westminster, by a rule of our said court intituled, &c. [*as the case may be*], were by the said court ordered to be paid by the said C. D. to A. B., and that of the said goods and chattels of the said C. D. in your bailiwick you



1839.
FIERI FACIAS.

interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf: And in what manner you shall have executed this our writ, make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the —— day of ——, in the year of our Lord ——.

No. X.

Writ of fieri facias on a judgment of an inferior court in an action of assumpsit, removed into the court of Queen's Bench.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of ——, greeting. We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made £——, which A. B. lately in [*insert the style of the court*], by the judgment of the said court, recovered against the said C. D. for his damages which he had sustained, as well on occasion of the not performing certain promises and undertakings then lately made by the said C. D. to the said A. B., as for his costs and charges by him about his suit in that behalf expended, whereof the said C. D. is convicted, as appears to us of record; and which judgment was afterwards, on the —— day of ——, in the year of our Lord ——, removed into our court before us at Westminster, by virtue of an order of our said court before us at Westminster, [*or* of———, one of the Justices of our said court before us at Westminster, *as the case may be*], in pursuance of the statute in such case made and provided; and the costs attendant upon the application for the said order, and upon the said removal, were, on the —— day of ——, in the year of our Lord ——, taxed and allowed by our said court before us at Westminster at the sum of £——. And we further command you that of the said goods and chattels of the said C. D. in your bailiwick you

1839.

FIERI FACIAS.

further cause to be made the said sum of £—— (16), together with interest on the said two several sums of £—— and £——, at the rate of four pounds per centum per annum, from the said —— day of ——, in the year of our Lord —— (17); and that you have that money, with such interest as aforesaid, before us at Westminster immediately after the execution hereof, to be rendered to the said A. B. for his damages aforesaid, and for costs and interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf: And in what manner you shall have executed this our writ, make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, Thomas, Lord Denman, at Westminster, on the —— day of ——, in the year of our Lord ——.

No. XI.

Writ of fieri facias on an order for payment of money made in an inferior court, and removed into the court of Queen's Bench.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of ——, greeting. We command you that of the goods and chattels of C. D. in your bailiwick you cause to be made £——, which lately in [*insert the style of the court*], by a rule of the said court, intituled, &c. [*as the case may be*], were by the said court ordered to be paid by the said C. D. to A. B., and which rule was afterwards, on the —— day of ——, in the year of our Lord ——, removed into our court before us at Westminster, by virtue of an order of our said court before us at Westminster [*or* of ——, one of the Justices of our said court before us at Westminster, *as the case may be*], in pursuance of the statute in that case made

(16) The costs attendant upon the removal of the judgment out of the inferior court into the court of Queen's Bench.

(17) The day on which the costs of removal were taxed.

1839.
FIERI FACIAS.

and provided; and the costs attendant upon the application for the said last-mentioned order, and upon the said removal, were, on the —— day of ——, in the year of our Lord ——, taxed and allowed by our said court before us at Westminster at the sum of £——. And we further command you that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £—— (18), together with interest on the said two several sums of £—— and £——, at the rate of four pounds per centum per annum, from the said —— day of —— (19); and that you have that money, with such interest as aforesaid, before us at Westminster, immediately after the execution hereof, to be rendered to the said A. B. for the said monies by the said rule first abovementioned ordered to be paid by the said C. D. to the said A. B., and for costs and interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf: And in what manner you shall have executed this our writ, make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the —— day of ——, in the year of our Lord ——.

No. XII.

Writ of fieri facias on an order for payment of money and costs made in an inferior court, and removed into the court of Queen's Bench.

VICTORIA, by the Grace of God, of the United Kingdom of Great Britain and Ireland, Queen, Defender of the Faith, to the Sheriff of ——, greeting. We command you that of the goods and chattels of C. D. in your baili-

(18) The costs of removing the rule of the inferior court into the court of Queen's Bench.

(19) The day on which the costs of removing the rule of the inferior court into the court of Queen's Bench were taxed.

1839.

FIERI FACIAS.

wick you cause to be made £——, which lately in [*insert the style of the court*], by a rule of the said court, intituled [*as the case may be*], were by the said court ordered to be paid by the said C. D. to A. B., and also £—— for the costs of the said rule by the said court also ordered to be paid by the said C. D. to the said A. B.; which said rule was afterwards, on the —— day of ——, in the year of our Lord ——, removed into our court before us at Westminster, by an order of our said court before us at Westminster, [*or* of ——, one of the Justices of our said court before us at Westminster, *as the case may be*], in pursuance of the statute in such case made and provided; and the costs attendant upon the application for the said last-mentioned order, and upon the said removal, were, on the —— day of ——, in the year of our Lord ——, taxed and allowed by our said court before us at Westminster at the sum of £——: And we further command you that of the said goods and chattels of the said C. D. in your bailiwick you further cause to be made the said sum of £—— (20), together with interest on the said three several sums of £——, and £——, and £——, at the rate of four pounds per centum per annum, from the said —— day of ——, in the year of our Lord —— (21); and that you have that money, with such interest as aforesaid, before us at Westminster immediately after the execution hereof, to be rendered to the said A. B. for the monies by the said rule first above-mentioned ordered to be paid by the said C. D. to the said A. B., and for costs and interest as aforesaid; and that you do all such things as by the statute passed in the second year of our reign you are authorized and required to do in this behalf: And in what manner you shall have

(20) The costs of removing the rule from the inferior court into the court of Queen's Bench.

(21) The day on which the costs of removing the rule from the inferior court into the court of Queen's Bench were taxed.

1839. FIERI FACIAS.

executed this our writ, make appear to us at Westminster immediately after the execution thereof, and have there then this writ.

Witness, Thomas Lord Denman, at Westminster, on the —— day of ——, in the year of our Lord ——.

DENMAN,	E. H. ALDERSON,
N. C. TINDAL,	J. PATTESON,
ABINGER,	J. GURNEY,
J. LITTLEDALE,	J. WILLIAMS,
J. VAUGHAN,	J. T. COLERIDGE,
J. PARKE,	T. COLTMAN,
J. B. BOSANQUET,	T. ERSKINE.

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ant Mary Davies claimed as heir general of one Thomas James Selby who died seised on the 7th December, 1772.

The mise was joined on the mere right—see the pleadings, 2 Scott, 71.

The cause had already been tried at the bar of this court in Trinity Term, 1835, when a verdict was found for the tenant, subject to certain exceptions to the ruling of the court. Those exceptions came on to be argued in the Exchequer Chamber, in Easter Vacation, 1837, and, in Easter Vacation, 1838, the judgment of the court of error was pronounced, awarding a venire de novo—see 5 Scott, 835. The demandant Thomas Davies having died since the former trial, the suit was proceeded with by the widow, Elizabeth Davies.

Tender of the demi-mark.

The demi-mark having been tendered on behalf of the tenant, and the knights and recognitors sworn separately, as in *Carne*, Dem., *Nicoll*, Ten., 1 Scott, 466—

Tenant's case.

The Attorney-General (with whom were *Wilde*, Serjeant, *Kelly*, *R. V. Richards*, and *Gray*,) stated the case on the part of the tenant.—James Selby, the grandfather of the testator, Thomas James Selby, was the purchaser of certain property at Wavendon, in Buckinghamshire, a small portion of the property now in question. James Selby, Serjeant-at-law, father of the testator, was the purchaser of the Whad-

of William Selby, in Trinity Term, 1784, was valid and effectual as a bar against all the world; and that it was admissible in evidence though not pleaded specially. See p. 33.

On the trial of a writ of right, decrees in Chancery in causes between the tenant's father and other persons not connected with the demandant, and to which proceedings the latter was neither party nor privy, were admitted for the purpose of shewing the character in which the tenant's father assumed and retained possession of the premises. See p. 30.

Receipts for rent (produced from the proper custody) given by the tenant's father in his own name after the date of the fine—Held, admissible to shew an exercise of ownership by him. See p. 33.

A Welsh pedigree was produced on the part of the demandant to prove the relationship to each other of certain of the parties through whom she claimed, and containing at the foot of it the following certificate—"collected from parish registers, wills, monumental inscriptions, family records, and *history*: this account is now presented as correct, and as confirming the tradition handed down from one generation to another, to Thomas Lloyd, of Cwm Gloyne, this 4th July, 1733, by his loving kinsman, and sincere friend and very devoted servant, William Lloyd:"—Held, inadmissible, though the custody whence it came was not objectionable, and the parties whose relationship it was sought to establish by it were known to the compiler. See p. 47.

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don estate, the principal part of the property in dispute, and other part was acquired by the testator himself. Thomas James Selby, the testator, upon whose will the tenant's claim rests, died a batchelor on the 7th December, 1772. From his will it appears that the testator, though unacquainted with his relatives on the part of his father and grandfather, was familiar with those on the part of his mother and grandmother. His mother was the daughter of Sir Rowland Alston, of Odell, in the county of Bedford. His grandmother was Margaret Wells, daughter of John Wells of Wavendon. His mother's only relatives who appear to have been known to him, were, Temperance Bedford and Ann Kent, the daughters of his first cousin, Temperance Alston (niece of his mother), who married the Rev. Arthur Bedford, minister of Sharnbrooke, in Bedfordshire. The relatives of his grandmother were, Ellen Wells, and Catherine and Elizabeth Franklyn, granddaughters and co-heiresses of Lionel Wells, the brother of his grandmother. These would, according to the rules of the common law, have been his heirs-at-law, failing descendants of the male line. The will evinces an anxious desire on the part of the testator that his property should go to a relation of the name and blood of the Selbys, but a total ignorance as to the individual who might fill that character; and that, in failure of this his primary object, the estates should go to William Lowndes, the father of the tenant.

Testator's knowledge of the state of his family.

Such being the limited nature of the testator's knowledge of his family, and such his desire as to the disposition of his property, he, on the 18th August, 1768, made his will. The material part of this will is as follows :—

"I give and devise to my right and lawful heir-at-law, for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the public papers, all my manors, rights, members, and appurtenances thereto belonging; also all my capital mes-

Will of Thomas James Selby. Devise to the testator's heir-at-law;

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suage known by the name of Whaddon Hall, and also divers parcels of lands inclosed, arable and meadow, situate, lying, and being in the parishes aforesaid, with all appurtenances thereto belonging: also all my chase known by the name of Whaddon Chase, with all the deer, soil, ground, together with timber and wood growing thereon: also all the coppices of wood being part of the same chase: also all that parcel of land known by the name of Whaddon Park: also all my other farms, messuages, lands, hereditaments, and premises, situate, lying, and being in the several parishes of Whaddon and Nash, Great Harwood, Little Harwood, Single Borough, Tottenhoe otherwise Tattenhoe, Shenley, Mursley, and Saldon and Ricchley, in the county of Buckingham, with their and every their rights, members, and appurtenances: to hold the aforesaid manor of Whaddon and Nash, capital messuage and messuages, farms, lands, tenements, and hereditaments, tithes, and premises, with the rights, members, and appurtenances as before-mentioned, to my heir-at-law, his heirs, executors, administrators, and assigns, for ever: subject to and charged and chargeable nevertheless with the payment of all my just debts, funeral charges, bonds, annuities, and all legacies hereinafter mentioned." The testator then proceeds to give legacies, amongst others, to Temperance Bedford, Mr. Franklin who married Elizabeth Wells, Ellen Wells, Mrs. Franklin (late Catherine Wells), and to Mrs. Ann Kent, sister of Temperance Bedford—"All of which debts, and all other debts by me owed, together with all which legacies, funeral charges, and appointments, I do hereby order and direct to be paid *by the said heir-at-law*, his heirs, executors, or assigns, *within twelve months after my decease*." Then follows the devise to William Lowndes, in these terms—"But, should it so happen that no heir-at-law is found, I then do hereby constitute and appoint William Lowndes, Esq., of Winslow, in the county of Buckingham, and now major in the

subject to debts and legacies—

to be paid within twelve months.

Devise to William Lowndes, if no heir-at-law be found.

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Franklyns: but they were held not to satisfy the description of heir-at-law contained in the will.

Lowndes took possession.

Under the last-mentioned decree, William Lowndes took possession of the estate as owner in April, 1783, assuming the name of Selby; and he continued to the time of his death, in 1812, in the complete and undisputed enjoyment of the property.

Lease and bargain and sale of April, 1784.

In April, 1784, William Lowndes, by the name of William Selby, executed an indenture of lease for ninety-nine years to one Hansom, and a bargain and sale (to the use of himself, his heirs and assigns, for ever); and, in Trinity Term, 1784, he levied a fine, with proclamations, of the premises demanded by this writ, in the name of William Selby. Whether the party levying the fine was then in possession claiming the fee by right or by wrong, the fine, after proclamations duly made, and five years' non-claim, operated a complete bar.

As to the supposed will of James Lloyd.

The main feature in the pedigree the demandants will attempt to establish, is, a supposed will of one James Lloyd, an attorney at Treviggin, which affords the sole evidence to connect the Selbys and the Lloyds, through whom they derive their title. The suggestion on the part of the demandants, is, that James Selby, the grandfather of the testator, was the son of Thomas Selby, of Neverne, Pembrokeshire, by Mary Lloyd, the sister of this James Lloyd. To shew the fallacy of this, it will be proved on the part of the tenant, that James Selby was the son of an Isabella Selby, who died in 1646; and that administration was, in 1647, granted to her son James Selby, the grandfather of the testator, and father of Serjeant Selby.

But, supposing the demandants to succeed in establishing their pedigree, four insurmountable objections to their right to recover present themselves.

1. The claim of the heir-at-law barred by the lapse of time.

1. The claim is advanced at too late a period. By the will, the estate devised to the heir-at-law is charged with the payment of the debts and legacies, and the will further

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3. Heir-at-law contemplated by the testator, an heir of the blood.

3. The primary object of the testator unquestionably was, to give his estate to an heir of his own name and blood. The demandant has none of the blood of the Selbys. The Wellses and the Franklyns, who were the testator's heirs on the part of his mother and his grandmother, took legacies under the will; and they inherited property purchased by the testator after the making of his will. But it was decided by Lords Mansfield and Loughborough, in the cases already alluded to, and recognised in the judgment of the Exchequer Chamber in this case, that an heir ex parte maternâ would not satisfy the terms of this devise. [*Tindal*, C. J.—For the purposes of this cause, I think we must hold ourselves bound by the opinion of the court of error.]

4. As to the validity of the fine.

4. The fine of Trinity Term, 1784, was properly levied, and operated a complete bar to all the world. By the decree of the 28th March, 1783, Mr. Lowndes ceased to be receiver, and acquired possession of the estate as owner: and the evidence that will be offered will conclusively shew that the name in which the fine was levied, was one that had been properly acquired by him to render it valid. Upon this point the opinion of the Exchequer Chamber is in favour of the tenant.

Tenant's evidence.

Death of W. Lowndes.

Tenant his heir.

The will of Thomas James Selby was read—see it fully set out, 5 Scott, 836. Mr. Appleyard, the solicitor of the Lowndes family, and steward of the manor of Whaddon and Nash, proved the death of the devisee William

of the person from whom the descent is to be traced, and their descendants, the mother of his more remote male paternal ancestor, or her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male paternal ancestor, or her descendants; and, where there shall be a failure of male maternal ancestors of such person, and their descendants, the mother of his more remote male maternal ancestor, and her descendants, shall be the heir or heirs of such person, in preference to the mother of a less remote male maternal ancestor, and her descendants."

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Wells and Others, the order of the 26th July, 1773, appointing William Lowndes receiver, a decree of the 23rd April, 1779, in *Hone* v. *Medcraft*, and a decree in both causes dated the 28th March, 1783. [This last was objected to on the part of the demandants.]

Lease to Hansom for 99 years.

An indenture bearing date the 21st April, 1784, purporting to be a lease granted by "William Selby," to one Hansom, for ninety-nine years if he should so long live, was put in.

Bargain and sale of April 23, 1784.

A deed of bargain and sale was also put in, bearing date the 23rd April, 1784, between William Selby, "lately called William Lowndes," of Winslow, in the county of Bucks, and John Skerrow, of Lincoln's Inn, for confirming the title, in which deed William Selby covenanted to levy a fine of the property in question, to the use of himself, his heirs and assigns, for ever; and also indentures of fine of the same lands, bearing date Trinity Term, 24 Geo. 3 (1784); and an office-copy of the record of the proclamations—the first of which appeared to have been made on the 29th June, 24 Geo. 3 (1784)—the second, on the 25th November, 25 Geo. 3 (1784)—the third, on the 11th February, 25 Geo. 3 (1785)—and the fourth, on the 7th May, 25 Geo. 3 (1785). [These were also severally objected to on the part of the demandants.]

Fine of Trinity Term, 1784.

Proclamations.

The bills and answers being in evidence, and the fine having been proved—

Decree of March 28th, 1783.

The Attorney-General proposed to read the decree of the 28th March, 1783, for the purpose of shewing the quality of Lowndes's possession of the property before and at the time of the levying of the fine.

Objections to its admissibility.

Talfourd, Serjeant, and *Sir W. Follett*, for the demandants.—The decree is not admissible for any purpose. It is res inter alios gestæ. The heir-at-law was no party to the suit in which it was pronounced. The court of Chan-

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the parties having agreed to settle the proportions thereof belonging to them respectively among themselves" (25).

Mortgage to raise money for payment of debts and legacies.

A mortgage-deed of the 14th April, 1788, between "William Selby, formerly William Lowndes, of Winslow, in the county of Bucks," and John Ford, reciting the will of Thomas James Selby, and the decree of the 28th March, 1783, and purporting to be made for the purpose of raising 10,000*l.* for payment of certain of the debts and legacies charged upon the estate, was also put in, and objected to.

Rejoicings on the occasion of Lowndes taking possession.

Two witnesses named William Missenden and James French deposed to rejoicings having taken place at the villages of Whaddon and Nash (distant about a mile from each other)—fiddling, dancing round a may-pole, and feasting—in the Spring of the year 1783, on the occasion of Lowndes coming there (from Winslow Hall, distant about six miles from Whaddon Hall,) to take possession, or, as one of the witnesses expressed himself, to "heir" the estate.

Payment of rent by tenants on receipts signed "W. Lowndes Selby."

Edward Hamlyn proved that his father had occupied a farm at Shenley under Lowndes, and that his brother and himself had succeeded to the occupation on the death of his father. He produced, from a drawer in a chest in which his late father's papers were usually deposited, receipts for rent, partly written and partly printed (the written part of which Mr. Appleyard proved to be in the handwriting of William Lowndes, the devisee); these receipts appeared to be signed "William Lowndes" down to June 1784, on and from which time downwards they were signed "W. Lowndes Selby."

(25) The part of the decree that was objected to declared—"that the manor of Whaddon and Nash, and other the premises devised by the said testator's will in manner therein mentioned to the said William Lowndes Selby, were to be considered as belonging to the said William Lowndes Selby, and that the said William Lowndes Selby be let into possession thereof, and that all the title-deeds and writings relating to the said estates should be also delivered to him."

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Sir W. Follett submitted that receipts for rent given by Lowndes in any other character than that of receiver, charging himself as such, were not evidence.

The Attorney-General.—Receipts given by Lowndes as and when receiver are of course admissible; those given by him in his own name after he had ceased to be receiver, are equally admissible, as shewing acts of ownership, and discharging his tenants from their liability to him. Suppose a witness were called who in June, 1784, had heard Mr. Lowndes say to a tenant—"I have assumed possession of this estate, and have changed my name, pursuant to the will of Thomas James Selby, and I tender you a receipt signed by me in the name of Selby, and require you to pay rent"—and proved that the rent was paid and the receipt given accordingly; would not that be admissible and cogent evidence to shew an exercise of ownership?

Sir W. Follett.—This is an attempt to enable a party to prove himself owner (the very question at issue) by receipts given by himself, and operating no charge upon him.

TINDAL, C. J.—The receipts coming from the proper custody, and operating against the interest of the party tendering them, I think they are evidence.

The rest of the court concurring, the receipts were read; but, on an intimation from *Sir W. Follett* that a bill of exceptions would be tendered to this ruling, *The Attorney-General* elected to withdraw them.

The fine was then formally tendered, and objected to by—

Objections to the fine:—

Talfourd, Serjeant, *Sir W. Follett*, and *Williams*, upon the grounds—first, that it was not evidence upon the issue

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joined between the parties; it should have been pleaded specially—secondly, that it was levied in a name to which the conusor had acquired no title whatever, by reputation or otherwise—thirdly, that the conusor, at the time of levying the fine, was a stranger to the inheritance, and was in possession of the land under special circumstances which could give him no estate therein by right or by wrong upon which the fine could operate.

1. That it was not pleaded specially.

1. Where the mise is joined on the mere right, the question to be tried is, whether the one party or the other has the more mere right: the effect of the fine is only to bar the remedy. The question has never received a judicial decision: it was incidentally raised in *Tissen*, dem., *Clarke*, ten., 3 Wils. 419, 2 W. Blac. 891. There the tenant had, by leave of the court, pleaded, in addition to the general issue, a plea in bar that a fine with proclamations was levied of the lands in question, in Michaelmas Term, 16 Geo. 2, and non-claim. Whereupon it was moved, for the demandant, that the tenant might shew cause why one of his pleas should not be struck out; because upon the first plea the mise was joined upon the mere right, which could only be tried by the Grand Assize, which must consist of four knights of the county girt with swords, and twelve other jurors, in all sixteen jurors or recognitors; but the issue to be joined upon the plea in bar of a fine and non-claim, must be tried by a common jury of twelve; and there could not be one venire to try both issues. Upon cause shewn, the court *seemed to be of opinion* that every thing might be given in evidence upon the mise joined upon the mere right, except collateral warranty—Brooke, *Droit*, pl. 48—*but did not give any positive opinion.* And ultimately a rule was drawn up, by consent, for striking out the second plea, the tenant being at liberty to give the fine in evidence under the general issue. [*Tindal*, C. J.—In this stage of the proceedings, we of course would not overrule the doctrine

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laid down in Bro. Abr. *Droit*, pl. 48, and recognized in Booth, p. 98.] In *Hardman* v. *Clegg*, Holt, N. P. C. 657, the fine *was* specially pleaded as a bar. The whole question is, whether the operation of the fine is a transfer of the right, or merely a bar of the remedy. That it in no degree varies the *right*, can hardly be disputed: like collateral warranty, it can only operate in bar of the entry.

2. That it was not levied in the true name of the conusor.

2. There is no evidence to shew that William Lowndes, the devisee, had ever assumed or was ever known or called by the name of Selby prior to the date of the fine. The court of error threw out an opinion that no royal license or formal authority to the conusor to change his name was requisite to the validity of the fine (5 Scott, 868), provided it was levied in the name by which he was known at the time. But that is not the state of facts proved here. There is no suggestion by witnesses that the conusor was ever known by any other name than that of Lowndes—no proof whatever that he had been known by any one by, or had ever used, the name of Selby until he executed the deed to lead the uses of this very fine. It is in evidence, that he entered on the receipt of the rents and held courts in the name of William Lowndes (except on one occasion, November 12th, 1783, when he used the name of William Lowndes Selby,) down to the time of levying the fine; and that the first court held by him after the date of the fine, 27th October, 1784, was held in the name of "William Selby, lately called William Lowndes." The authority cited on the former occasion (Shep. Touch. p. 8) is decisive to shew that a fine levied in any other than the true christian and surname of the party cannot be set up as a bar. The law requires that a fine shall be so levied that all the world shall have notice who the party is.

3. That the conusor had no sufficient estate

3. The next question is, whether Mr. Lowndes had any sufficient estate to enable him to levy a fine. He is to be

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to enable him to levy a fine.

presented as a person who had acquired a tortious freehold. The evidence, however, shews that he was not in claiming the freehold, but that he entered in the first instance as receiver; and there is nothing to warrant the Grand Assize in inferring that he had ever acquired any *right* or that he *claimed* to be in as of his own estate. He was in actual possession rightfully, under the order of the court of Chancery, and accountable to the heir when he should be found. The decree of March, 1783, has already been held not to be conclusive as to the right; the court of Chancery could confer none: the only effect of that decree therefore was, to discharge Lowndes from his character of receiver. How, then, could he have acquired a freehold? There was no disseisin: to constitute a disseisin, the entry must be wrongful, and in spite of the true owner. Lowndes entered claiming under the will. He might, it is true, by making a feoffment, have created a tortious fee, and so have acquired such an estate as would have sufficed to sustain a fine: but he has not adopted that course. The facts sworn to by Missenden and French do not amount to evidence of a tortious entry. In *Shields* v. *Atkins*, 3 Atk. 562, Lord Hardwicke says: "If the defendant had a mind to gain an estate by wrong, he should have made a feoffment with livery, which would have been a disseisin, and then a fine levied afterwards, and five years run out after the title accrued, is a bar." In *Taylor* d. *Atkyns* v. *Horde*, 1 Burr. 110, Lord Mansfield says: "The precise definition of what constituted a disseisin which made the disseisor the tenant to the demandant's præcipe, though the right owner's entry was not taken away, was *once* well known; but it is not *now* to be found. The more we read, unless we are very careful to distinguish, the more we shall be confounded. For, after the assize of novel disseisin was introduced, the legislature, by many acts of parliament, and the courts of law, by liberal constructions in further-

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ance of justice, extended this remedy, for the sake of the owner, to *every* trespass or injury done to his real property, if, by bringing his assize, he thought fit to *admit* himself disseised. The reports of assize can only relate to cases where the owner *admits* himself disseised. The law books treat of disseisin with a view to the *assize*, which was the common method of trying titles till ejectment came in use. Littleton, who wrote long after the remedy by assize was enlarged by statutes and by an equitable latitude of construction, speaks of disseisins principally as between the owner and trespasser or possessor, with an eye to the remedy by *assize*. These are the common places from whence many descriptions have been cited of a disseisin. But such authorities can give little light to the present question, which depends upon the nature of such a disseisin as made the disseisor tenant to every demandant, and freeholder de facto, *in spite of the true owner*. Yet the definitions in the books (though very imperfect) savour often of that which originally was an actual disseisin in spite of the owner. Littleton, in § 279, defines disseisin with an &c.—'Where a man enters into lands or tenements (where his entry is not congeable), and ousteth him which hath the freehold, &c.' The comment says—'Every entry is no disseisin, unless there be *an ouster of the freehold*.' And Co. Litt. 153. b. says, *Disseisin* is, putting a man out of *seisin*, and ever implies a wrong; but *dispossession* or *ejectment* is, putting out of *possession*, and may be by right *or* wrong. Disseisin est un personal trespass de tortious ouster del seisin.'" *Doe* d. *Burrell* v. *Perkins*, 3 M. & S. 271, is a very strong authority to the same effect. There, a tenant for life (remainder to R. P. in fee) leased for her life, and died in 1799, and the lessee continued in possession without paying rent till his death in 1805, when his son took possession, and continued without paying rent; and in 1807 levied a fine with proclamations: it was held that the heir of R. P., the remainder-man, might maintain ejectment against the son, with-

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out an actual entry to avoid the fine. And Lord Ellenborough said: "It seems that in order to constitute a title by disseisin there must be a wrongful entry; but here has been no wrongful entry, but only a wrongful continuance of the possession; therefore there was no disseisin." In *Jerritt* v. *Weare*, 3 Price, 575, it was held, that, to constitute a disseisin in fact, there must be a manifest intention to oust, as well as an actual ouster. "Let us see," says Graham, B., in delivering the judgment of the court, "what a disseisin in law has been defined to be; and that may readily be shewn by a few passages from the old books. Lord Coke has adopted the definition of Bracton and Fleta (the Mirror)—'Disseisina is a putting out of a man out of seisin, and ever implieth a wrong; but dispossessing or ejectment is a putting out of possession, and may be by right or wrong.' Then he comes to his illustration, 'Omnis disseisina est transgressio, sed non omnis transgressio est disseisina. Si eo animo forte ingrediatur (now that word forte is extremely important) fundum alienum non quod sibi usurpet tenementum vel jura, non facit disseisinam, sed transgressionem, &c. Quærendum est a judice quo animo hoc fecerit.'" The same learned Baron, in *Doe* d. *Davis* v. *Davis*, 1 C. & P. 130, says: "A person, to levy a fine, must either have a freehold by right or by wrong. And, if by wrong, the cases shew that the possession must be adverse. There must be a wrong in the original entry." And in *Doe* d. *Parker* v. *Gregory*, 2 Ad. & E. 14, a widow, tenant for life of lands settled upon her for jointure (such settlement being made in execution of a power granted to the deceased husband), married, and levied a fine of the lands jointly with her second husband; and it was held that the fine was void. These several authorities shew that the mere being in, and continuing in claiming to be owner, is not enough to make the original entry tortious, so as to operate a disseisin.

The Attorney-General, and *Wilde*, Serjeant, contrà.— All

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character of the possession at the time of the fine levied—though true it is that Mr. Lowndes at first entered as receiver, there is evidence that at a subsequent period (antecedent to the date of the fine) he ceased to fill the character of receiver, and retained possession claiming the estate as his own—coming in a public manner to assume the possession as owner, and holding courts as lord of the manor. There is therefore clearly some evidence that before the fine was levied Mr. Lowndes had been in possession claiming adversely an estate of freehold. There being a question to be left to the Grand Assize upon the effect of the fine, I think we should be violating our duty if we withheld it from their consideration.

The rest of the court concurring, the fine and proclamations were accordingly received (subject to a bill of exceptions), and read by the officer.

Admission of the testator, his father, and grandfather to the society of the Inner Temple.

Proof was then given, from the books of the society of the Inner Temple, of the admissions of "James Selby, of Salford, in the county of Bedford," on the 1st July, 1647; of "James Selby, son of James Selby, of the Inner Temple, gentleman," on the 15th February, 1676; and of "Thomas James Selby, Esq., son and heir of James Selby, late Serjeant-at-law, deceased," on the 26th April, 1744.

Register of burial of *Isabella Selby*.

The Rev. W. O. Smith, the rector of Salford (the parish adjoining to Wavendon), produced the register of Salford, and read thence entries of the burials of the following persons—Richard Selby, the 22nd September, 1634—William Selby, the 10th February, 1635—and Isabella Selby, the 10th February, 1644.

Administration granted to James Selby of the goods of his mother, *Isabella*.

A clerk from the prerogative office produced the act book of the grant of administrations in the diocese of Canterbury for the years 1646-7, containing a grant of administration of the goods of Isabella Selby, "dum vixit, de Salford, com. Buckingham," to her son James Selby. Mr. Appleyard stated, that, shortly after the former trial, he was informed by Mr. Lowndes that the existence of the last-mentioned

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document had been communicated to him by one Williams; and Mr. Williams stated that he saw the entry in question about sixteen years ago, and that, on reading the report of the former trial of this cause, it recurred to his memory, and he gave information of it to Mr. Lowndes.

A deed bearing date the 18th January, 1664, and bearing the signature of James Selby (the grandfather of the testator), was also put in (26).

Mrs. Orlebar, the daughter of Temperance Bedford (who was called on the former occasion to prove that there existed a descendant of a nearer male maternal branch than that through which the demandant claimed), having died since the last trial, the evidence she then gave was read from Mr. Gurney's notes.

This closed the tenant's case.

Thursday, Nov. 29th.

Demandants' case.

Talfourd, Serjeant, then addressed the court and Grand Assize on the part of the demandants.—After giving a general outline of the evidence he proposed to offer, and particularly referring to the will of James Lloyd of Monington (No. 6 in the pedigree), the document which was on the former occasion suggested to be a forgery, as to which he observed that there was nothing singular in a testator, being an attorney, particularly describing the individual in whose favour he makes a bequest—the learned Serjeant proceeded to urge the following answers to the points of law raised on the part of the tenant:—

General outline.

1. If the first objection to the demandants' right to recover be available now, it would have been equally valid if made at the expiration of twelve months after the testator's decease. The devise to Lowndes was conditional,

1. Lapse of time no bar.

(26) The object of the evidence detailed in the last four paragraphs, was, to shew the fallacy of the statement in the pedigree attempted to be established on the part of the demandants (post, p. 43), that the James Selby therein stated to have settled at Wavendon, was the son of Thomas Selby of Neverne, by Mary, the daughter of Alban Lloyd, and sister of James Lloyd of Monington.

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to take effect as an absolute devise in the event of no l at-law of the description pointed at presenting hims not within twelve months—not within a reasonable t for, the doctrine of reasonable time can have no a cation in the case of freehold—but at any time within period fixed by the law as the limit for the bringing writ of right.

2. As to the demandant's heirship.

2. It has already been decided that it is not amo the relatives of the testator on the part of his mat grandmother that the heir-at-law is to be looked With regard to the priority of No. 10 before No. 11 late statute 3 & 4 Will. 4, c. 106, has *declared* the law t in accordance with the position laid down by Mr. Ju Blackstone.

3. As to the blood.

3. As to the want of Selby blood in the deman Elizabeth Davies, the court have already intimated they feel themselves upon that point bound by the dec of the court of error in favour of the demandants.

4. As to the fine.

4. In discharging Lowndes from his character of rece the court of Chancery could not and did not by the d of March, 1783, derogate from the rights of the heir-at Lowndes's possession under that decree was rightful, th defeasible. The character of his entry was not altere the fine. The question is not, with what intention he l the fine; but what was the character in which he ent and remained in possession. The testator never c have intended that his heir-at-law should be ousted b levying of a fine.—This is a mode of assurance that ancestors wisely required to be conducted with the gre publicity. It must be levied in the true name of the p Now, the only direct evidence of Lowndes ever having the name of Selby before the date of the fine, is, ir deeds of April, 1784, prepared by his solicitor for the poses of this very fine. On both grounds the court o to direct the Grand Assize, that the fine is in point of inoperative and no bar to the demandants' claim.

Character of Lowndes's possession.

Name in which fine levied.

The following pedigree was then put in:—

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The Attorney-General admitting that the lineal descendants of James Selby and Margaret Wells were extinct, and that No. 8 in the pedigree was the son of No. 7, the following evidence was adduced in support of the rest of it:—

Admission that the lineal descendants of James Selby and Margaret Wells extinct, and that William was the son of Evan Lloyd.

A witness named Ann Evans proved that the demandant, Elizabeth Davies, was the great granddaughter ex parte maternâ of Erasmus Lloyd, No. 11.

An extract from the register of the parish of St. Dogmell's was produced to shew the marriage of George Lloyd (No. 10) with Sudna Rowland, in January 1690, and also the baptism of their son Erasmus, in December, 1691.

Demandant great granddaughter of Erasmus Lloyd.

The registrar of the diocese of Bangor produced the transcript of the register of Denio, in Carnarvonshire (the registers themselves being lost), shewing the marriage of Erasmus Lloyd with Catherine Jones on the 24th April, 1715, and the baptism of John and Sudna, their children.

Will of John Chilton.

The deputy registrar in the office of the archdeaconry of Oxford produced the will of John Chilton, dated the 12th May, 1658, and proved the 22nd January, 1668, It appeared that this John Chilton had a sister named Isabella Selby, who had a son James, who was shewn by the will to have been about this time a schoolmaster at Reading, in Berkshire.

Will of Judith Odell

The deputy registrar of the archdeaconry of Bedford produced the will of Judith Odell, dated the 3rd June, 1643, and proved the 13th November, 1643, which contained amongst others the following bequest:—"As for my temporal estate, I dispose of it in this manner: Item. I give and bequeath unto my dear cousins Henry Lloyd of Soulberry, in the county of Bucks, clerk, and James Selby of Monnington, in the county of Pembroke, gentleman, all my live and dead stock, household furniture, plate, money, and other effects, the same to be divided between them in equal parts: and as for my leasehold estate now in my occupation, I give the same to my dear cousins for their joint lives; and my will is that the longest liver shall take the whole." The two cousins above named were appointed executors.

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The deputy keeper of the records in the Prerogative Court of Canterbury produced the will of Henry Lloyd of Soulberry, in the county of Bucks, clerk, dated the 11th April, 1646, and proved the 2nd May, 1646, which contained a statement that the testator, when lately in Wales, had left certain money, chattels, and other effects in the hands of certain friends there, and instructions to his executors to distribute them amongst certain persons as directed by the testator by a writing under his hand and seal, which writing was deposited by him in the hands of his sister Ellen Ellis.

Will of Henry Lloyd.

Mr. Valentine Davis, the deputy registrar of the diocese of St. David's (in which office he succeeded Thomas Jones), produced from the Consistory Court of Carmarthen the will of James Lloyd, of Monington, in the county of Pembroke (described in the pedigree as "an attorney at Treviggin"), who died in 1669. This will bore date the 19th September, 1669, and contained, amongst other things, the following bequest:—"*To James Selby, of Wavendon, in the county of Buckingham, the son and only issue of Thomas Selby, of Neverne, in this countie, by my sister Mary, his deceased wife, the sum of fortie pounds of current English money.*" The will likewise contained a bequest of 4*d.* to the cathedral of St. David's; 2*d.* to the church of Monington; and 2*d.* to the poor of the parish. The testator's messuage and lands in St. Dogmell's were devised to his son and heir, Evan, charged with a payment to his two brothers John and George of eight score pounds, being four score pounds a year to each; to his wife during her widowhood he devised the moiety of his messuages and lands in Monington; and all his personal estate to his son Evan, who was appointed executor, to pay debts and legacies. Annexed to the will was an inventory of the chattels of the testator, the whole of which amounted in value to 39*l.* The will was properly indexed (the index was produced)—"Testamentum Jacobi Lloyd de Monington, 1669." Mr. Davis stated, that, when he became the deputy registrar, he found the wills in a very

Will of James Lloyd of Monington.

Inventory.

Index.

State of the wills in the Consistory

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irregular condition—some in bundles, some in sacks, and some loose. And Harris, a clerk to one Morgan, Thomas Jones's predecessor, proved that he found the will in the state in which it then was, in a bag in the Consistory Court of Carmarthen.

The only other evidence as to the finding of the will was that of the Rev. T. Griffiths, who had in right of his wife preferred a claim, which he had abandoned on discovering that she was a connection of the half-blood of the Selby family. This gentleman stated, that, on searching in the Consistory Court at Carmarthen, some years since, he found the name of James Lloyd of Monington in the Index; and that the will was produced to him in the presence of two clerks in the office, Dodd and Harris, the latter of whom had made search for it by the direction of C. Morgan, the then deputy registrar.

Evidence as to the genuineness of the will of James Lloyd.

Mussett's evidence.

Mr. Mussett, deputy record keeper in the Prerogative Court of Canterbury (an office he had filled for a period of twenty-five years), having had the will put into his hands, stated, that, from his knowledge of the general style of handwriting of the period in question, he saw no reason to doubt that the will was genuine, or that the signature of the surrogate to the will and to the inventory were either of them forged.

Courthope's evidence.

Mr. Courthope, a translator of old records, and a person of considerable experience in such matters, also stated that to the best of his belief the will was a genuine document.

Documents shewing James Lloyd to have possessed property at Treviggin.

A deed of release, bearing date the 11th October, 1620, from Evan ap Rees to Alban Lloyd of Freystrop, a bond, dated the 11th December, 1629, in which Evan ap Rees was the obligor and Alban Lloyd the obligee, and various other deeds, were produced for the purpose of shewing that Alban Lloyd was the purchaser of the Treviggin estate, and that it descended in succession to James, to Evan, and to William Lloyd, Nos. 6, 7, and 8, in the printed pedigree, ante p. 43.

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Proof was given of the burial of James Selby, the grandfather of the testator, at Wavendon, on the 27th October, 1688; and Mr. Valentine Davis produced from the Consistory of Carmarthen the will of William Lloyd of Treviggin, in the parish of Monington, in the county of Pembroke (No. 8 in the pedigree, who was admitted to be the son and heir of Evan Lloyd, No. 7), dated the 4th February, 1734, which contained a bequest to the testator's cousin Evan Lloyd (fifth son of No. 10), and in a codicil to which it was stated that the Treviggin estate had in 1821 been settled on John, the third son of George Lloyd (No. 10) of St. Dogmell's.

Death of testator's grandfather.

Will of William Lloyd.

Morrice Williams, Esq., of Cwm Gloyne, whose grandmother was a Miss Lloyd of that place, and who acquired the estate of Cwm Gloyne about fifty years since by devise from his kinsman Thomas Lloyd, who was a member of the family of the Lloyds in question, produced an old Welsh pedigree which on taking possession of the estate he found deposited in a drawer in a locked room in the mansion, amongst other papers relating to the family property. On the back of this pedigree was the following indorsement, which Mr. Williams proved to be in the handwriting of Thomas Lloyd:—"This is the pedigree of my family. Thomas Lloyd;" and at the foot was the following certificate:—

Welsh pedigree.

"Collected from parish registers, wills, monumental inscriptions, family records, and history. This account is now presented as correct, and as confirming the tradition handed down from one generation to another, to Thomas Lloyd, Esq., of Cwm Gloyne, this fourth day of July, 1733, by his loving kinsman and sincere friend and very devoted servant, William Lloyd."

Certificate.

Mr. Courthope stated that the signature of William Lloyd to the will last produced, was in the same handwriting as that of William Lloyd subscribed to the above certificate.

The purpose for which this pedigree was offered, was, to prove who were the uncles and cousins of William Lloyd, No. 8 in the *printed* pedigree, ante p. 43.

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Objections to the above pedigree.

The Attorney-General and *Wilde*, Serjeant, for the tenant, submitted that the above pedigree was not presented in such a shape as to make it evidence, not being a statement by a member of the family of a matter within his own knowledge—the only ground upon which such a document can be evidence. It is true, that, where the contrary does not appear, it may be assumed that a pedigree has been compiled from legitimate sources. But here that presumption is repelled by the certificate. History is not evidence to prove a pedigree.

Argument in support of its admissibility.

Talfourd, Serjeant, contrà.—The pedigree is admissible to the extent at all events to which it is sought here to use it, viz. to prove the connection of the parties named who existed within the memory of Thomas and William Lloyd, the persons by and for whom it was compiled. In 3 Starkie on Evidence, 1100, 1102, it is said, that, "as in matters of pedigree it is impossible to prove the relationships of past generations by living witnesses, resort must usually be had to *traditionary declarations* made by those now dead, who were likely to *know* the fact, and to declare the truth, or to evidence of *general reputation*." "The tradition must therefore be derived from persons so connected with the family that it is natural and likely, from their domestic habits and connections, that they are speaking the truth, and that they could not be mistaken (27)." Lord Eldon, in *Whitelocke* v. *Baker*, 13 Ves. 514, says: "Declarations in the family, descriptions in wills, inscriptions upon monuments, descriptions in Bibles, and registry books, all are admitted upon the principle that they are the natural effusions of a party who must know the truth; and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth. But there may be many circumstances forming part of the tradition, which you would reject, taking the body of the tradition."

(27) See Vowles v. Young, 13 Ves. 140.

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1786, directing that the sum of 19,407*l.* 12*s.* 5½*d.* standing to the credit of the causes of *Hone* v. *Medcraft* and *Lowndes* v. *Wells*, should be paid out in certain proportions to certain creditors and legatees.

Friday, Nov. 30th.

Evidence in reply.—As to the authenticity of the supposed will of James Lloyd.

The demandants' case being closed, Mr. Holmes, the keeper of the Manuscripts in the British Museum, and the Messrs. Hardy, one the chief clerk in the Record office in the Tower, the other the assistant record keeper in the office of the Duchy of Lancaster (all of them persons accustomed to the examination of antient documents and records with a view to ascertaining whether they were genuine or spurious), were called on the part of the tenant. Upon looking at the will, they unhesitatingly pronounced it not to be a genuine document. They stated that they were induced to come to this conclusion, from the general character of the writing, its stiffness, and want of freedom; and they pointed out several instances of letters formed in a character of a later introduction than the period in question, and also of the improper use, and in some instances the total omission, of the common marks of abbreviation. The witnesses all declared the signature of the surrogate and of George Morgan, a witness, to be different in the will and the inventory (which latter was admitted to be genuine); and they stated that many persons in London obtained a livelihood by the forgery of antient deeds and writings upon old paper—fly-leaves of printed books &c. of the required date.* It was suggested by one of the Messrs. Hardy that the writer had the genuine will before him to copy from, and succeeded in imitating it with tolerable accuracy, with the exception of the clause printed in *italics* in p. 45, where (having no copy before him) he relapsed into his usual style. This gentleman also asserted in his

* One of these ingenious scribes was put into the witness-box. He produced several beautiful specimens of his art. He also stated his belief that the will of James Lloyd was not written at the time it bore date: but, on his cross-examination, he admitted, that, though he could *copy*, he could not *read* old writings.

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demandants must have established to the satisfaction of the Grand Assize the several links of the pedigree. Although it is sufficiently proved by the evidence of Ann Evans that the demandant Elizabeth Davies is descended from Erasmus Lloyd, the supposed heir, and that Evan, John, and George Lloyd were the sons of James Lloyd of Treviggin; yet no evidence whatever has been offered to shew that Erasmus Lloyd was the son of George Lloyd of St. Dogmell's by Sudna Rowland; or to shew the birth, marriage, or death of Mary Lloyd, or that she was connected with the Selby family, save the fabricated will of James Lloyd. On the other hand, it has been proved, on the part of the tenant, that, in 1653, one James Selby of the Inner Temple became the possessor of considerable estates at Wavendon, and that administration was in 1644 granted of the goods of Isabella Selby, of Salford (a parish adjoining Wavendon), to her son James Selby, who was identified as the James Selby who became a member of the Inner Temple in 1647, and was the grandfather of the testator. This alone suffices to extinguish the demandants' case. There is nothing in the wills of John Chilton, Judith Odell, or Henry Lloyd, to shew that those parties, or any of them, had any connection with Salford, or that the Isabella they refer to was the same individual as the Isabella Selby above mentioned, the mother of the testator's grandfather.

As to the evidence in support of the demandants' pedigree.

Looking at James Lloyd's will, and at the loose and disreputable custody whence it was brought, no reasonable doubt can be entertained that it is a forgery. That a genuine will of a James Lloyd of Monington formerly existed, there is no doubt; but it is perfectly clear that the document produced is not that will, but an ingenious fac-simile, with the interpolation of a clause exactly describing the individual wanted to connect the two families of the Selbys and the Lloyds; and that the fictitious will was substituted for the original in the registry of the Con-

As to the will of James Lloyd.

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death (1772) and the time of levying the fine (1784), ample time had been afforded for the making of claims, and for the pretensions of the several claimants to be disposed of. And, regard being had to the extreme difficulty of giving at this distant period of time any very precise evidence of the frequent user by Mr. Lowndes of the new name he had just assumed, enough has been shewn to satisfy the Grand Assize that the change of name had really and bonâ fide taken place, and that a fine levied by him in any other than the name of Selby would have been irregular and informal. Evidence has been given of solemn acts done by him in that name as well before as since the date of the fine. In April, 1784, he executed a lease for ninety-nine years to Hansom, and also the deed to lead the uses, both in the name of "William Selby." This last-mentioned deed, though it may in some sense be said to form part of the fine, is wholly immaterial and unnecessary to its operation: for, in the absence of a deed to lead the uses, the fine will enure to the use of the conusor. The courts of the manor, too, were held in the name of William Selby. With regard to the orders pronounced by the court of Chancery in the years 1785 and 1786, wherein the father of the tenant is called William Lowndes Selby, they only shew that he was known at the time by the name of William Lowndes Selby as well as by that of William Selby; and these orders were mere continuations of a suit in which he had before been styled William Lowndes Selby. It cannot be presumed, in the teeth of the direct evidence of the assumption of the name of William Selby, that this gentleman was not at the time known by that name. It is enough even if he had for the first time used it in levying the fine; for, the levying the fine in any other name would have been a forfeiture of the estate.—This case cannot be assimilated to any of those that have been cited on the part of the demandants. Down to the date of the decree in March, 1783, Mr. Lowndes was clearly in possession of the property merely as bailiff or receiver, having no estate

As to the character of Lowndes' possession.

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i the land. There is ample evidence to shew, that, immediately after that decree was pronounced, he took possession, and from thenceforth continued to claim and to hold the property in the character of owner, receiving as such the rents and profits. There was therefore a sufficient estate whereon the fine could operate.

Summing up.

TINDAL, C. J.—Gentlemen of the Grand Assize,—It now becomes your duty to determine by your verdict, whether, upon the evidence that has been presented for your consideration, the tenant in this writ of right hath more mere right to hold the tenements demanded against him, or the demandants to have them as they demand. The writ was originally sued out by Thomas Davies and Elizabeth his wife; but, since the former trial, Thomas Davies has died, and the claim is now prosecuted on behalf of his widow. In the course of this investigation, several questions have arisen, with some of which, they being mere questions of law, you will not be troubled: these, should it be necessary, must be reserved for another tribunal.

Questions of law.

1. Demandant's claim not barred by the lapse of time.

The questions of law that may thus arise, are these:— 1. The claim of the demandant, which is derived through a line of ancestry connected (in a manner that will hereafter be more particularly adverted to) with Thomas Selby, the great-grandfather of the testator, Thomas James Selby, is, it is contended on the part of the tenant, advanced at too remote a period. It is said that twelve months, or, at all events, a *reasonable time*, must be held to be the limit within which the testator required the heir-at-law to make his claim. It appears that this point came incidentally at least before the court of error. According to our judgment, the heir-at-law was at liberty to advance his claim at any period however distant, provided his title was not barred by any statutory limitation. If the tenant be dissatisfied with our ruling upon this point, he may have the benefit of any doubt, upon a bill of exceptions.

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2. Rule of inheritance.

2. It is further contended, on the part of the tenant, that, supposing the demandant to have in other respects succeeded in establishing her claim, there are living parties whose rights the law prefers—claiming through a branch less remote than that through which she claims, viz. the maternal grandfather. But we hold the law to have established, that, where the consanguinity has to be made out on the paternal side of the ancestors of the party, the more remote branch must be exhausted before recourse is had to the less remote. The point, though formerly much doubted, has been considered settled ever since the time of Sir William Blackstone.

3. As to the blood.

3. It is contended in the next place that the demandant Elizabeth Davies is excluded by the terms of the will, not being of the blood of the Selbys. On the former trial, we entertained an opinion that the heir contemplated by the testator, and the unknown object of his bounty, must be of the Selby blood. But, the court of error, by which the cause has been sent down to a second trial, having held that this construction is not warranted by the true principles of legal interpretation, we feel it to be our duty to take the law upon the subject from them, and on this occasion to rule accordingly—reserving to ourselves the right, should we ever be called upon to re-consider the matter, freely and impartially to declare our deliberate opinions upon it.

Having thus stated the several points of law that have been urged on the part of the tenant (which you will do well to dismiss entirely from your minds), I shall now proceed to direct your attention more particularly to the questions of fact upon which you will be called on to exercise your judgment.

As to the demandant's pedigree.

With respect to the pedigree, little difficulty in our opinion exists in the ascending line, save in the proof of Erasmus Lloyd (No. 11) being the son of George Lloyd (No. 10) and Sudna Rowland. This George Lloyd is described as having married Sudna Rowland in 1690. He

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tradicted. Thus we trace the life of this James Selby from the date of his admission in 1647, down to the time of his death in 1688.

Will of Judith Odell.

It appears that Judith Odell, of Salford, by her will, dated the 3rd January, 1643, and proved on the 13th November in the same year, gave certain leasehold property to her two cousins "Henry Lloyd, of Soulbery, clerk, and James Selby of Monington, Pembrokeshire, gentleman." And the will of Henry Lloyd is produced for the purpose of shewing by a recital therein contained that he had some connection with Wales. Coupling this with the rest of the evidence, it will be for you to say whether the James Selby spoken of as the cousin of Henry Lloyd was the same James Selby who came to the Inner Temple in the year 1647. Many causes may be suggested that *might* have brought him to Salford about that time.

Proof that James Selby was the son of Isabella Selby of Salford.

Evidence was given on behalf of the tenant to shew that James Selby of Wavendon (No. 2) was the son of Isabella, and not of Mary Selby, as attempted to be established on the part of the demandant. If that be made out to your satisfaction, the main link in the demandant's title is altogether falsified. In support of this part of the case, the tenant mainly relies on the grant of administration of the goods of Isabella Selby, of Salford, in 1646, to her son James Selby. In answer to that, the demandant contends that this James Selby who took out administration of the goods of Isabella Selby, was a schoolmaster at Reading; and to establish this the will of John Chilton is produced. Upon this conflicting testimony, it is for you to say whether the one story or the other is the more likely to be correct. If you are satisfied that the mother of James Selby, the testator's grandfather, was Isabella Selby, and not Mary Lloyd, then there is a fatal blot in the demandant's case. If, on the other hand, you find the will of James Lloyd to be an authentic document, then we are bound to tell you that it makes out the whole case as far as the pedigree is

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it, and exercising dominion over it as his own; for, if so, then he had such an estate as would make the fine available in law as a bar against all the world.

As to the name in which the fine was levied.

In order, however, to give validity to a fine, it is not only necessary that it should be levied by one having or claiming to have an estate of freehold; it must also be levied in the true name of the party. Another question, therefore, will be submitted to you, viz. whether Mr. Lowndes had at the time taken, and was known by, the name of Selby; for, a fine levied by a stranger to the estate, or in a name by which the party has never been known, is inoperative; but, if levied by one in possession, claiming the freehold, and using a name which he has assumed (no matter how, no fraud being intended) and been known by, such fine is good for all legal purposes.

As to the character of Lowndes's possession.

The evidence upon these two points may be summed up in a narrow compass. We will first consider that which relates to the circumstances and character in which the devisee, Lowndes, entered upon and retained the possession of the estate. It appears that Thomas James Selby, the testator, died on the 7th December, 1772. By his will, dated the 19th August, 1768, he devises as follows:—"I give and devise to my right and lawful heir-at-law, for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the public papers, all my manors, with the rights, members, and appurtenances thereto belonging; also all my capital messuage known by the name of Whaddon Hall, and also divers parcels of land inclosed, arable and meadow, situate &c., with all appurtenances thereto belonging; also all my chase known by the name of Whaddon Chase, with all the deer, soil, ground, together with the timber and wood growing thereon; also all my coppices of wood being part of the same chase; also all that piece of land known by the name of Whaddon Park; also all my other farms, messuages, lands, hereditaments, and premises, situate, lying,

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law; and in the meantime Mr. Lowndes was appointed receiver. Two actions of ejectment were thereupon brought, the one in the King's Bench, the other in this court, which were disposed of in the years 1780 and 1781. The result of these proceedings was, that, on the 28th March, 1783 (down to which time Mr. Lowndes, as receiver, took the rents, paying them in to the proper officer of the court, to the credit of the cause), a final decree was pronounced in the two causes, declaring the will well proved, and that the same ought to be established and the trusts thereof performed and carried into execution; and ordering that the same should be performed and carried into execution accordingly: and it was further ordered that what was then already reported due for principal and interest of the testator's debts and legacies, and the subsequent interest to be computed thereon, should be raised by mortgage or sale of the testator's said estate subjected to the payment thereof by his will, or of a sufficient part thereof, with the approbation of the Master, and as he should direct; and that all proper parties should join in such mortgage or sale as the Master should direct: and it was further ordered that 22,658*l.* 18*s.* Bank Annuities, standing in the name of the Accountant-General in trust in the said causes, under the title of '*Hone* v. *Medcraft*' and '*Lowndes* v. *Wells*,' which had arisen from the rents and profits of the manor, park, tithes, and other estates at Whaddon, and were paid into the Bank by the said receiver (there called William Lowndes Selby), should be transferred to the said William Lowndes Selby — the parties having agreed to settle the proportions thereof belonging to them respectively between themselves. The effect of this decree was, that Mr. Lowndes ceased to fill the character of receiver; the title-deeds of the property comprised in the devise to him were delivered up to him; and, as far as the decree went, he was to be considered as the owner.

Final decree, March 28, 1783.

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Now, what course was Mr. Lowndes likely under the circumstances to pursue? Was it not probable that a person who had been ten years litigating his right to an estate, should, when that litigation had terminated in his favour, take possession of the estate as his own, instead of going on in his character of receiver? We have evidence of what he actually did upon the occasion: we have the testimony of two eye-witnesses—William Missenden and James French—as to certain rejoicings that took place at Whaddon and at Nash in the Spring of the year 1783, the occasion of which was Mr. Lowndes's coming to take possession, or, to use the remarkable expression of the former of these witnesses, "to heir the estate." It further appears, that, in 1788, Mr. Lowndes (by the name and description of "William Selby, formerly William Lowndes, of Winslow, in the county of Bucks,") executed a mortgage for raising a sum of 10,000*l.* towards payment of the debts and legacies charged upon the estate. Coupling that with the rest of the facts that have been laid before you, it is a circumstance to shew that he was dealing with the property as his own. Upon this part of the case, therefore, it will be for you to say whether or not you are satisfied that the father of the tenant in this writ of right had before the date of the fine entered into the possession of the estate, claiming and exercising dominion over it as his own. If you are satisfied that he was not, but that he retained possession as receiver, or in any other character incompatible with a claim to the freehold, the fine will not be available: if, on the other hand, he was in claiming and disposing of and dealing with the estate as his own, then he clearly had a sufficient seisin to make a fine levied by him a complete and effectual bar.

Facts as to the assumption of possession.

The next question is, whether, at the time of levying the fine, the conusor was known by the name of Selby. Now, the fine was levied in Trinity Term, 1784. It is extremely

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difficult at so great a distance of time to shew very accurately by what name the conusor was known. You must therefore look attentively at the evidence that you have heard, and reason a little with yourselves as to the probabilities of the case: bearing in mind that the estate was left to Mr. Lowndes, "on condition he change his name to Selby;" and considering what was likely to be the course adopted by a man who had, after ten years' litigation, obtained possession of property his right to which was to depend upon the performance of such a condition. It appears, that, from the time that Lowndes became receiver, in 1773, down to the date of what is called the final decree, in March, 1783, he held the manor courts in his own name. Mr. Appleyard, the steward of the manor, has produced before you the court books, whence it seems, that, on and prior to the 27th May, 1772, the courts of the manor were held in the name of Thomas James Selby, the testator; that the next court after the decease of the testator, was held on the 16th May, 1774, in the name of William Lowndes (he having been appointed receiver in July of the preceding year); that a court was held on the 15th April, 1776, another in April, 1777, and another on the 14th November, 1781, all in the name of William Lowndes; that the next court was held on the 12th November, 1783 (which was after the date of the decree putting Lowndes in possession as owner), in the name of William Lowndes Selby; that another court was held on the 27th October, 1784, in the name of William Selby, lately called William Lowndes; and that, in 1786, and thence down to the time of his death, the devisee continued to hold courts in the name of William Selby. Here you perceive a marked distinction taking place in the manner of holding the courts: in that held next before the levying of the fine, Mr. Lowndes is called *William* Lowndes *Selby*; but, in that held immediately after, he is described as *William Selby*.

Manor courts, how held.

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In determining the question as to the change of name, you will take into account the proceedings in Chancery subsequent to the date of the decree of March, 1783, and the levying of the fine—one ground of which seems to have been that certain documents which ought to have been delivered up to Mrs. Hone were retained by Mr. Selby, who is there described as "William Lowndes Selby, heretofore William Lowndes." This description does not appear to me to be entitled to much weight, seeing the little probability of Mr. Selby having personally interfered in the matter, and that that is the name by which he had been described in an earlier stage of the cause. It is, however, a circumstance that you must not altogether lose sight of.

Proceedings in Chancery subsequent to the decree of March 28, 1783.

The three points therefore for your determination are—

First question.

1. As to the pedigree. Are you satisfied that the demandant has succeeded in establishing the pedigree as stated in the count? If not, you may spare yourselves the trouble of further investigation; for then the tenant has the better right to hold the premises demanded. If you think the pedigree has been made out, then the next inquiry will be—whether the fine levied in Trinity Term, 1784, was so levied as to operate a bar of the demandant's right: and

Second question.

that will depend upon two questions—1. whether the conusor was at the time in possession of the premises

Third question.

claiming an estate of freehold—2. whether the fine was levied in the name by which the conusor was at the time known.

If you find either of these questions in the negative—if you are not satisfied, that, at the time of levying the fine, the conusor had, or was in possession claiming to have, an estate of freehold in the premises, and that the name in which the fine was levied was one which the conusor had used and been known by—then the fine will not be available as a bar.

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TINDAL, C. J.—Then, Gentlemen, your verdict is for the tenant?

Foreman of the Grand Assize.—Yes, my Lord.

Talfourd, Serjeant, observed that the verdict must be taken as a general verdict, as there cannot be a special verdict in a writ of right.

To this the Court assented.

Verdict for the tenant.

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These are distinct and independent covenants: it is only the implied covenant for quiet enjoyment that is qualified and controlled by the express covenant—*Norman* v. *Foster*, 1 Mod. 101—"If I covenant that I have a lawful title to grant, and that you shall enjoy notwithstanding any claiming under me; these are two several covenants, and the first is general, and not qualified by the second:" per Lord Hale: "And so said Wylde, J.; and that one covenant went to *the title*, and the other to *the possession*." *Howell* v. *Richards*, 11 East, 642: per Lord Ellenborough—"The covenant *for title*, and the covenant *for right to convey*, are indeed what is sometimes improperly called synonymous covenants; they are however connected covenants generally of the same import and effect, and directed to one and the same object; and the qualifying language of the one may therefore properly enough be considered as virtually transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser that the grantor has the very estate in quantity and quality which he purports to convey, viz. in this case an indefeasible estate in fee-simple. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon." *Fraser* v. *Skey*, 2 Chit. 646. *Burnett* v. *Lynch*, 5 B. & C. 589, 8 D. & R. 368: per Littledale, J.—"An action of covenant will lie by the lessee against the lessor upon the word 'demise' in the lease; but that word imports a covenant in law on the part of the lessor that he has good title, and that the lessee shall quietly enjoy during the term." Bacon's Abridgment, *Covenant*, (B). Viner's Abridgment, *Covenant*, (G). Comyns's Digest, *Covenant*, (A. 4). [*Parke*, B.—It would seem an absurdity to hold that the lessor meant to covenant absolutely for title by the word "demise," when he afterwards by an *express* covenant confines the warranty for quiet enjoy-

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ment to the acts of those claiming under him. *Littledale*, J.—The breach would, according to the argument, be good, if the plaintiff were evicted by a party without any title whatever.] The two implied covenants are so distinct in their nature that the lessee might sue for a breach of the implied covenant for title the moment the covenant is entered into: but he could not sue in respect of a breach of the covenant for quiet enjoyment until an actual eviction has taken place. [*Alderson*, B.—The fallacy of your argument is this: you assume that two distinct covenants are implied from the word "demise:" now, though it is true that that word imports a covenant upon which you might assign as a breach either want of title or eviction; yet, accompanied as it is here by an *express* covenant against the acts of the lessor, his executors, administrators, or assigns, "or any person or persons whomsoever claiming or to claim from, through, under, or in trust for him, them, or any of them," it is confined to the breach by eviction.] An implied covenant is not always inconsistent with an express one. Thus, in *Randall* v. *Lynch*, 12 East, 179, where a ship was let to freight by charterparty from the plaintiff to the defendant, a clause in the deed—"and it is hereby *covenanted and agreed* by and between the said parties that *forty days shall be allowed* for unloading and loading again," &c.—was held to raise an implied covenant on the part of the freighter not to detain the ship for loading and unloading, &c., beyond the forty days. So, in *The Earl of Shrewsbury* v. *Gould*, 2 B. & A. 487, where a lessee covenanted that he would at all times and seasons of burning lime supply the lessor and his tenants with lime at a stipulated price, for the improvement of their lands and repair of their houses; it was held that this was an implied covenant also that he would burn lime at all such seasons, and that it was not a good defence to plead that there was no lime burned upon the premises out of which the lessor could be supplied. And in *Webb* v. *Plum-*

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mer, 2 B. & A. 746, where a lease provided that the tenant should during the term fold his flock of sheep which he should keep on the demised premises, under a penalty if he omitted to do so; it was held that this amounted to a covenant to keep a flock of sheep upon the premises. Had the plaintiff here, as he might have done—*Saltoun* v. *Houstoun*, 8 Moore, 546, 1 Bing. 433; *Gainsford* v. *Griffith*, 1 Saund. 58 *f*; *Barton* v. *Fitzgerald*, 15 East, 530—declared upon this lease according to its legal effect, it would have appeared as an express covenant for title, and no eviction need have been alleged. There is nothing in the case of *Holder* v. *Taylor*, Hobart, 12, Brownlow, 22, to warrant the inference that the covenant for title implied under the word "demise" is extinguished by an express covenant for quiet enjoyment.

Channell, who was to have argued in support of the judgment of the court below, was stopped by the court.

LORD DENMAN, C. J.—We are unanimously of opinion that the judgment of the court of Common Pleas in this case must be affirmed. That court could not have decided otherwise than they have done, without violating one of the first principles of the construction of deeds, as established in *Nokes's* Case, 4 Rep. 80. b., and, more recently, in *Merrill* v. *Frame*, 4 Taunt. 329. That the word "demise" does imply a covenant for title, as well as a covenant for quiet enjoyment, is true: but both are restrained and qualified by a subsequent *express* covenant for quiet enjoyment.

Judgment affirmed.

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GIBSON and Others, Assignees of JOHN MALLANDA
Bankrupt, *v.* THE EAST INDIA COMPANY.

Friday, Jan. 11*th.*

The pension payable to a military officer on his retirement from the service of the East India Company, does not, upon his bankruptcy, pass to his assignees; such pension not being granted *by deed*, and consequently not recoverable by an action at law.

THE plaintiffs were assignees of the estate and ef John Mallandaine, a bankrupt; and this action was b to recover the sum of 182*l.* 10*s.*, being the half-year ment claimed to be due at Christmas, 1836, of a p payable to the bankrupt by the East India Comp consequence of his having served in India as a n officer the required period to entitle him to a pensio to his pay as a lieutenant colonel.

The declaration stated, that, in consideration of services rendered to the defendants by the said Mallandaine, the defendants promised to pay him a sum of 365*l.*, by two half-yearly payments; and the was, that they had refused to pay the plaintiffs, his nees, a half-yearly payment which became due his bankruptcy. The defendants pleaded that th not promise as alleged.

The present case was submitted to the court u judge's order, pursuant to the statute 3 & 4 Will. 4 s. 25.

By one of their regular instructions, called " M

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The bankrupt entered the service of the East India Company some time in the year 1808; and previously to the year 1834 the bankrupt had attained the rank of lieutenant colonel in the Madras army, and performed the requisite service to entitle him to his retirement and pension within the meaning of the said instruction; and accordingly he did retire in November, 1834: and on the 24th November, 1834, according to the usual course, the court of directors, upon his application, resolved that Lieutenant Colonel John Mallandaine, of the Madras Establishment, be permitted to retire from the service on the full pay of lieutenant colonel, namely 1*l.* per day; the same to commence from the date of such application. The pension was paid to the said John Mallandaine by half-yearly payments until his bankruptcy, which took place on the 29th October, 1836.

The said sum of 182*l.* 10*s.* had been paid by the defendants to the said John Mallandine since he became a bankrupt, and after the defendants had notice of his said bankruptcy.

It was agreed that the court might draw such inferences from the above facts as might appear reasonably to result from them.

If in the opinion of the court the plaintiffs were entitled to recover, the judgment was to be entered for the plaintiffs, by confession, for 182*l.* 10*s.*: if they should be of a contrary opinion, then judgment of nonsuit was to be entered.

In the margin of the defendants' paper-book was the following note—

"The defendants will contend that the allowance made by them to retiring officers, is in the nature of the allowance called half-pay made to officers retiring from the service of her Majesty; that it was always intended, and had always been considered in the nature of a personal

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gratuity, and had never been granted by deed or in any form indicating that the defendants meant to become absolutely and irrevocably liable to the payment of such allowance; and that the circumstance of the allowance never having been granted by deed shewed that it was never treated on either side as part of the contract between the parties."

At the suggestion of the court, the following additions were made to the special case:—

"The commission appointing John Mallandaine a lieutenant colonel was in the words following:—

"'The Right Hon. S. R. Lushington, governor and commander in chief of the fort and garrison of Fort St. George and town of Madras Patnam, and of all the forces which are or shall be employed for the service of the United Company of Merchants of England trading to the East Indies, in the said fort, garrison, and town, and president of the council of Fort St. George, and the rest of the council thereof, To Major John Mallandaine, Greeting—

"'We, reposing especial trust and confidence in your loyalty, courage, and good conduct, do by these presents constitute and appoint you to be lieutenant colonel of the 27th regiment of Native Infantry, in the said United Company's service, and do give and grant you full power and authority to take your rank as lieutenant colonel of the 27th regiment of Native Infantry in the said service, from the 13th day of November, 1829. You are therefore carefully and diligently to discharge the duty thereof, by exercising and well disciplining inferior officers and soldiers who may from time to time be put under your command. And we do hereby command them to obey you as lieutenant colonel of the 27th regiment of Native Infantry: and you are to observe and follow all such orders and directions from time to time as you shall receive from us, the governor and council for the time being, or any other your superior

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" ' Table of Pay and Allowances in Sonat, Madras, Bombay rupees for a month of thirty days.

In Garrison or Cantonment.							
Native Infantry.	Pay.	Gratuity.	Tent allowance.	House rent, if only in receipt of half batta, and not provided with quarters.	Horse allowance.	Half batta.	Total.
Lieut.-Colonel.	240 Rs.	0	150 Rs.	100 Rs.	30 Rs.	300 Rs.	820 Rs.

In the Field.						
Native Infantry.	Pay.	Gratuity.	Tent allowance.	Horse allowance.	Full batta.	Total.
Lieut.-Colonel.	240 Rs.	0	150 Rs.	30 Rs.	600 Rs.	1020 Rs.

" This pay is drawn from the paymaster of the district, on what is termed an abstract, in the form of a bill, thus—

" ' The Honorable the East India Company,

" ' Dr. to

" ' Lieutenant Colonel of the —— regiment.

" ' Pay for the month of ——	Rs. 240
" ' Tent allowance	150
" ' House rent	100
" ' Horse allowance	30
" ' Half batta	300
Total	Rs. 820 ' "

The case was argued in Michaelmas Term last.

Wilde, Serjeant (*Cleasby* was with him), for the plaintiffs.—The bankrupt having entered the service of the East India Company under a contract entitling him to a retiring pension equal to the pay of the rank to which he had attained, after twenty-five years' service in India, and having served for the stipulated period, the legal right to

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mentioned: and it may be assumed that the instructions or military letters conferring the pension in question were duly approved and confirmed by the board of control; for, the case finds that it has continued in force and been acted upon ever since. [*Tindal*, C. J.—The resolution bears date three years later than the statute.]

It will be contended on the part of the company, that, this contract not being by deed, its performance cannot be enforced by action. It was formerly held that all contracts (with a few trivial exceptions) entered into by bodies corporate should be by deed: but the rule has of late years been considerably relaxed. In *The Mayor of Stafford* v. *Till*, 12 Moore, 260, 4 Bing. 75, it was held that assumpsit for use and occupation might be maintained by a corporation aggregate against a tenant who had occupied premises under them and paid rent: and in *The Mayor of Carmarthen* v. *Lewis*, 6 C. & P. 608, that a corporation aggregate might maintain assumpsit for the use and occupation of standings, market places, sheds, and tolls, on an agreement not under seal. In *The East London Water-Works Company* v. *Bailey*, 12 Moore, 532, 4 Bing. 283, where the directors of an incorporated company were authorized by act of parliament to "make contracts, agreements, and bargains with the workmen, agents, undertakers, and other persons employed or concerned in making, completing, or continuing the works belonging to the said undertaking: it was held that the company could not recover in assumpsit for the non-delivery of certain pipes, which the defendants, by contract not under seal, had agreed to deliver: but that was on the ground that the contract was *executory*. The whole law upon this subject has recently been well considered by the court of King's Bench, in the cases of *Beverley* v. *The Lincoln Gas Light and Coke Company*, 6 Ad. & E. 829, 2 N. & P. 283, and *Church* v. *The Imperial Gas Light and Coke Company*, 6 Ad. & E. 846, 3 N. & P. 35. In the former of these cases it was held that assumpsit

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well as real property. But this, though true in theory, was intolerable in practice; the very act of affixing the seal, of lifting the hand, or opening the mouth, could only be done by some individual member, in theory quite distinct from the body politic, or by some agent; the management of the corporate property, the daily sustentation of the members, the performance of the very duties for which the corporation was created, required incessantly that acts should be done, sometimes of daily recurrence, sometimes entirely unforeseen, yet admitting of no delay, sometimes of small importance, or relating to property of little value. The same causes also required that contracts to a small amount should often be entered into. In all these cases, to require the affixing of the common seal was impossible; and therefore, from time to time, as the exigencies of the case have required, exceptions have been admitted to the rule: and what we desire to draw attention to is this—that these exceptions are not such as the rule might be supposed to have provided for, but are in truth inconsistent with its principle and justified only by necessity. As each exception of this kind was made, it was not unnatural that the rule in all other yet unforeseen cases should receive confirmation, though it would be hardly fair to anticipate thence what the opinion of the judges would have been if the cases had been presented before them and required their decision. In the progress, however, of these exceptions, it has been decided that a corporation may *sue* in assumpsit on an *executed* parol contract; it has also been decided that it may *be sued* in *debt* on a similar contract: the question now arises on the liability *to be sued in assumpsit*. It appears to us that what has been already decided in principle warrants us in holding that this action is maintainable." This judgment was evidently pronounced after the most mature consideration of its extensive application, and claims peculiar respect. In *Church* v. *The Imperial Gas Light and Coke Company*, it was held that a

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tract could it be contended that these would be evidence of a valid contract after execution, but of a wholly inoperative one before? Unless positions such as these can be maintained, we do not see how to support any distinction between express executory and executed contracts of the description now under consideration." "The general rule of law, is, that a corporation contracts under its common seal: as a general rule, it is only in that way that a corporation can express its will or do any act. That general rule, however, has from the earliest traceable periods been subject to exceptions, the decisions as to which furnish the principle on which they have been established, and are instances illustrating its application, but are to be taken as so prescribing in terms the exact limit that a merely circumstantial difference is to exclude from the exception. This principle appears to be convenience amounting almost to necessity. Wherever to hold the rule applicable would occasion very great inconvenience, or tend to defeat the very object for which the corporation was created, the exception has prevailed: hence the retainer by parol of an inferior servant, the doing of acts very frequently recurring, or too insignificant to be worth the trouble of affixing the common seal, are established exceptions; on the same principle stands the power of accepting bills of exchange and issuing promissory notes by companies incorporated for the purposes of trade, with the rights and liabilities consequent thereon."

6 Ad. & E. 861. 2 N. & P. 46.

Contract for pension need not be by deed.

The contract in question is not one that required to be made by deed. It is not the grant of an annuity, which can only be recovered by writ of annuity (29), the future arrears by sci. fa. on the judgment: it is a mere agreement for wages for past services. In *Moore* v. *Lewis*, 1 Vent. 27, 1 Sid. 413, where assumpsit was brought upon a promise to pay the plaintiff 10*l.* a year, though the judg-

29) See Webb. v. Jiggs. 4 M. & S. 113.

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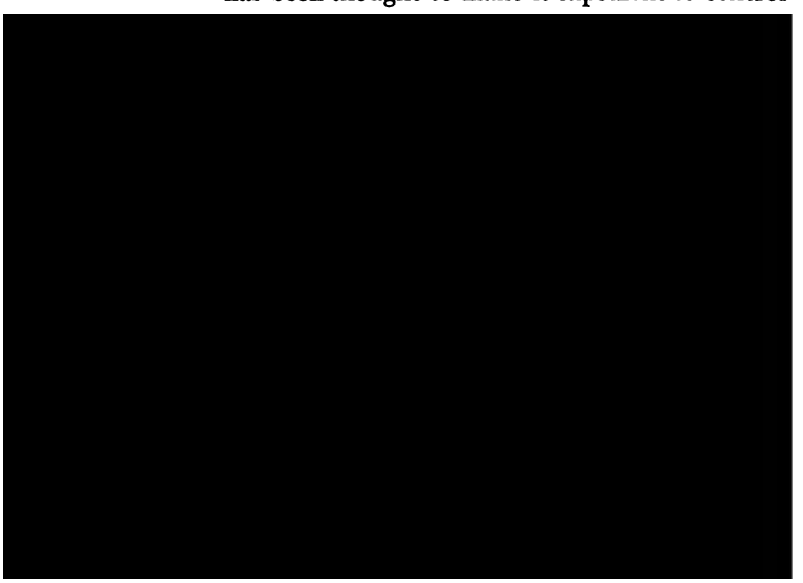
But subsequent cases have decided that military is not the subject of sale or assignment (30). however, a material and manifest distinction betw pay and the pension in question. Half-pay is (though there never has been an instance of its r without reasonable ground), and has reference to different state of things. A British officer on continues under all the responsibility of a soldi liable to be at any time called into active ser therefore public policy requires that he be in of continual readiness and present capacity fo But the same reasons of public policy have no a to a case like the present: the payment is for vices; the officer is under no liability to, and h ther ceased to have any connection with, the com

Chelsea pensions, by the 28 Geo. 2, c. 1, s. 1, and c. 16, s. 26—Greenwich pensions, by the 3 Geo s. 2, and 10 Geo. 4, c. 26, s. 5—Excise pensions, b 8 Geo. 4, c. 53, s. 121—and the pensions grante Duke of Marlborough, by the 5 Anne, c. 4, s. 4, t of Chatham, by the 18 Geo. 3, c. 65, and to the Wellington, by the 54 Geo. 3, c. 161, s. 28—are all declared to be inalienable. Thus, wherever pub has been thought to make it expedient to control



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seal, except in trifling matters, or things of necessity and of frequent occurrence, which neither vest nor devest any interest—Com. Dig. *Franchises*, F. 13.; Bac. Abr. *Corporations*, (E) 3; *The King* v. *The Inhabitants of Chipping Norton*, 5 East, 239. Where the act is one that is necessarily incident to the nature and character of the corporation, and that cannot conveniently be done under seal, modern decisions have undoubtedly sanctioned a departure from the strict legal rule. There is nothing in the nature of this contract, or in the 33 Geo. 3, c. 52, s. 125, to dispense with the formality of a grant by deed under the common seal of the company.

Analogy to half-pay.

There is no permanent legal interest in half-pay, which is in some respects analogous to the pension in question, and which clearly is not assignable—*Flarty* v. *Odlum*, 3 T. R. 681; *Lidderdale* v. *The Duke of Montrose*, 4 T. R. 248; *Stone* v. *Lidderdale*, 2 Anst. 533; *Davis* v. *The Duke of Marlborough*, 1 Swanst. 74: and see the 1 & 2 Vict. c. 110, s. 56 (31).

Reply.

Wilde, Serjeant, in reply.—An annuity, strictly and properly so called, undoubtedly can only be granted by deed; but it is not every annual payment, be it for life or for term of years, that constitutes an annuity. Much valuable learning upon this subject will be found in Plowden, 131. The company, by their military letters of 1796, held out the prospect of a retired allowance as an inducement for parties to enter and to continue in their service. The bankrupt has performed all that was requisite on his part to entitle him to the benefit of this contract: and, unless the law requires that the appointment of every soldier, whether officer or private, shall be by deed, there is nothing

(31) It was formerly held that an annuity granted pro consilio impendendo was not assignable without special words: but it is now settled to be otherwise—see Maund's case, 7 Rep. 28. b., Hetley, 80. Cujus est dare, ejus est disponere.

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Exceptions thereto.

Rex v. *Bigg*, 3 P. Wms. 423, "the common seal is the hand and mouth of the corporation."

But, on this general rule, both in antient and still more frequently and largely in modern times, have exceptions been grafted; so that it is now undoubted law, that, in very many cases, actions are maintainable in our courts upon contracts entered into by or on behalf of corporations aggregate, though such contracts are not under seal. It is only necessary to allude to one class of these exceptions, determined in very early times, which relate to contracts either expressly entered into by corporate bodies or which result from acts done by them in matters of slight importance, of frequent recurrence, and of necessity for the existence and carrying on of the corporation itself; such as, the employment of a butler or cook, or the appointment of a bailiff for distraining beasts damage feasant, and the like; because the case now before us cannot upon any ground of analogy be held to fall within this class: but our attention must be more particularly directed to that larger class of excepted cases which has grown up principally in modern times, where the contract which has been entered into is one the allowance of which is necessary for or incidental to the carrying into effect the very purposes and objects for which the corporation itself was originally created.

It is upon the principle and reason on which this class of exceptions is grounded, that the course of argument on the part of the plaintiffs has proceeded; and whether the contract now under consideration falls within this exception, or remains under the control of the general rule of law, is the question before us.

Now, allowing to this class of exceptions the widest range to which it has ever been carried, and taking it to have been correctly laid down in the late case of *Beverley* v. *The Lincoln Gas and Coke Company*, 6 Ad. & E. 829, 2 N. & P. 283, it is this—that, when a company is instituted

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Foundation of the company's privileges.

The statute 8 & 9 Will. 3, c. 44, and the charter of incorporation granted by the king under the powers of that act, form the foundation of the privileges of the present united East India Company. And, from the provisions made by that statute, it is evident that the company was established originally and in the first instance for the purposes of *trade only;* namely, of exclusively trafficking and using the trade of merchandize to and from the East Indies, and in all places between the Cape of Good Hope and the Straits of Magellan, and with no other object or design. But, without adverting to various enlargements by the legislature in subsequent reigns of the term for which the charter was originally granted, it will be sufficient for the present purpose to observe, that, about the commencement of the reign of George the Third, a question arose between the government and the East India Company, as to the claim set up by the latter to the possession of the territorial acquisitions in India, which had been made by them—a claim inconsistent with the general principle prevailing in the law both of this and other states, namely, that all conquests made by subjects must necessarily belong to the crown. And in consequence of this contention, an agreement was entered into between the company and the public, "that the territorial acquisitions and revenues lately acquired in the East Indies should remain in possession of the company and their successors" during the term therein mentioned; an agreement which was carried into effect by the statute 7 Geo. 3, c. 57. The term therein mentioned was afterwards enlarged, and the possession and government of the territorial acquisitions continued in the said united company by subsequent acts of the legislature, down to the present time; without prejudice, however, as declared by the preamble to the statute of the 53 Geo. 3, c. 155, s. 61, "to the undoubted sovereignty of the crown of the United Kingdom of Great Britain and Ireland in

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cer; and, although it may differ, in some particulars, from a grant of half-pay by the crown to the officers of the army or navy, upon their retirement from actual service, yet it bears a much stronger analogy to it in the mode of its being granted, and in the consequences attending it, than to any contract. Now, it is clear that no action could be supported against any one to recover the arrears of half-pay granted by the crown, at least unless the money has been specifically appropriated by the government, and placed in the hands of the paymaster or agent to the account of the particular officer: and there is no ground upon general principle to hold that an action could be maintained against any one, unless under the same circumstances, in the present case.

It was, indeed, strongly argued at the Bar, that, as the resolution under which the retiring pensions are paid has been sanctioned by the commissioners for the affairs of India, it has by such approval become obligatory on the company, and in the nature of a contract. But we think there is no ground for giving such operation to the act. The object of the statute 33 Geo. 3, c. 53, was that of creating a board of commissioners to superintend, direct, and control the acts, operations, and concerns relating to the civil and military government or revenues of the company's territories and acquisitions in the East Indies; to make the approval of the board essential before instructions are sent out, but not to give additional force or legal obligation to the resolution itself beyond that which it originally possessed.

The grant in question, therefore, appears to us to range itself under that class of obligations which is described by jurists as imperfect obligations—obligations which want the "vinculum juris," although binding in moral equity and conscience; to be a grant which the East India Company, as governors, are bound in foro conscientiæ to make good, but of which the performance is to be sought for by

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consequently no such right has passed to his assignees; and therefore we give judgment of nonsuit.

Judgment of nonsuit (32).

(32) See the late insolvent debtors act. 1 & 2 Vict. c. 110. s. 56. by which it is enacted—"that nothing in this act contained shall extend to entitle the assignee or assignees of the estate and effects of any prisoner, being or having been an officer of the army or navy, or an officer or clerk or otherwise employed or engaged in the service of her majesty, in the Customs or Excise, or any civil office, or other department whatsoever, or being or having been in the naval or military service of the East India Company, or an officer or clerk or otherwise employed or engaged in the service of the court of directors of the said company, or being otherwise in the enjoyment of any pension whatever under any department of her majesty's government, or from the said court of directors, to the pay, half-pay, salary, emoluments, or pension of any such prisoner, for the purposes of this act: Provided always, that it shall be lawful for the said court to order such portion of the pay, half-pay, salary, emoluments, or pension of any such prisoner, as on communication from the said court to the secretary at war, or the lords commissioners of the Admiralty, or the commissioners of the Customs or Excise, or the chief officer of the department to which such prisoner may belong or have belonged, or under which such pay, half-pay, salary, emoluments, or pension may be enjoyed by such prisoner, or the said court of directors, he or they may respectively, under his or their hands, or under the hand of his or their chief secretary, or other chief officer for the time being, consent to in writing, to be paid to such assignee or assignees, in order that the same may be applied in payment of the debts of such prisoner; and such order and consent being lodged in the office of her majesty's paymaster-general, or of the secretary of the said court of directors, or of any other officer or person appointed to pay, or paying, any such pay, half-pay, salary, emoluments, or pension, such portion of the said pay, half-pay, salary, emoluments, or pension as shall be specified in such order and consent shall be paid to the said assignee or assignees, until the said court shall make order to the contrary." This is a re-enactment of the 7 Geo. 4. c. 57. s. 29.

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of money, amounting in the whole to a large sum, to wit, the sum of 20,000*l.*, out of which the said company might and ought to have paid and satisfied the said plaintiff the said sums of money; and thereupon it became and was the duty of the said General Cemetery Company, out of the said sums of money so received by them as aforesaid, to pay to the said plaintiff the said several sums of 5,000*l.* and 1,000*l.*; yet the said General Cemetery Company did not in the first place lay out and apply, nor have since (although often requested) in any manner whatsoever laid out or applied the said sums of money so by them raised and received as aforesaid, or any part thereof, in or towards paying or discharging the said sums of 5,000*l.* and 1,000*l.* so due and owing to the said plaintiff as aforesaid: whereby, and by reason of the nonpayment of the said several monies respectively, an action hath accrued to the plaintiff to demand and have of and from the said General Cemetery Company the said several monies respectively, amounting to the said sum of 6,000*l.* above demanded; yet, to pay the same, or any part thereof, the said General Cemetery Company have hitherto wholly refused and still refuse, to the damage of the plaintiff of 10*l.*, and therefore he brings his suit &c.

Second plea.

To this declaration the defendants pleaded—secondly, that the plaintiff bestowed his said work and labour, and paid, laid out, and expended the said monies in and about the applying for, obtaining, and passing the said act of parliament in the declaration mentioned, and in and about the said other matters and things and expenses preparatory and relating thereto, as in the declaration mentioned, voluntarily and of his own accord, without the request of any person whatsoever, and without any contract or agreement expressed or implied with any person whatsoever for the payment of any money for the said work and labour, or the repayment of the said monies so paid, laid out, and expended as aforesaid, or any part of them; and this the said company were ready to verify.

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and other works by the act authorized, any sum or sums of money not exceeding in the whole the sum of 45,000*l.*, the whole to be divided into 1,800 shares of 25*l.* each. And by section 20 it is enacted, "that all the money to be raised by the said company by virtue of the act should be laid out and applied in the first place in paying and discharging all costs and expenses incurred in applying for, obtaining, and passing the act, and all other expenses preparatory or relating thereto, and the remainder of such money should be applied in and towards purchasing lands, tenements, and hereditaments, and making and maintaining the said cemetery and other works by the act authorised to be made, and in otherwise carrying the act into execution." It is admitted by the pleas that the plaintiff has done the work and expended money in the manner alleged in the declaration; and it is no answer to his demand to say that the work was done and the money expended by him as a volunteer; neither does the act make it a condition precedent that particulars, with dates and vouchers, should be furnished to the company. In *Tilson* v. *The Warwick Gas-Light Company*, 7 D. & R. 376, 4 B. & C. 962, where a private act incorporating a gas-light company enacted that the costs of obtaining the act should be paid out of the money subscribed, in preference to all other payments, it was held that the attorney who obtained the act might sue the company *in debt* upon the act for his costs. Bayley, J., says: "It has been strongly urged that the form of the action should have been case and not debt, as on the 8 Anne, c. 14, case is the proper form of action against the sheriff for removing goods without levying a year's rent. The distinction between the cases is this: the 8 Anne does not direct the sheriff to pay the rent to the landlord, but makes it his duty to levy the rent before he removes the goods; and, if he removes the goods without levying the rent, he is guilty of a breach of duty, and liable for the damage arising therefrom. But this act of

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money by rates. Any person may advance money to them, for the purposes of the act, in purchase of annuities, which shall be payable and paid by the commissioners out of the money arising from the rates. The act prescribes the form of the grant: which purports, that, by virtue of the act, five of the commissioners, in consideration of the sum advanced to them by the party, grant to him an annuity out of the rates to arise by virtue of the act. A declaration in case against the clerk stated that the plaintiff advanced a sum to the commissioners for the purchase of an annuity; whereupon, by a grant made according to the form of the statute, five commissioners, by virtue of the act, in consideration of the advance, granted to the plaintiff an annuity out of the rates: that a quarterly payment of the annuity became due; that the commissioners then held in their hands, out of the rates, money more than enough to satisfy it: whereupon it became their duty to pay it; and that they had not paid it. It did not appear by the pleadings that there were any annuitants besides the plaintiff:—It was held that case was maintainable against the clerk for this breach of duty by the commissioners; and that the declaration was not bad, on general demurrer, for want of an averment that the money was advanced for the purposes of the act; nor for omitting to aver that the commissioners had received money enough to satisfy all annuitants. *Case v. Chapman*, 5 Ad. & E. 647, 1 N. & P. 104.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—

The whole of the argument in this case, although it arose upon a special demurrer to the second and third pleas of the defendants, has turned upon the validity of the declaration; for, as to the two pleas that are demurred to, it was virtually admitted on the part of the defendants that they are not sufficient in law. The defendants have, therefore, insisted upon various objections against the

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alleges it to be labour and expense incurred in procuring the very act of parliament under and by which the defendants obtained their incorporation: that is, it was labour bestowed and expense incurred by the plaintiff, which the individuals who afterwards became the company have adopted: and, as to the amount in value of such labour and expenditure, the jury would have to fix that by their verdict.

1. As to the averment that defendants had funds.

It was next objected on the part of the defendants, that the declaration does not state that the defendants had any money in their hands at the time the plaintiff demanded his debt, or, at all events, that they had sufficient in their hands to satisfy the demand of the plaintiff. And if this objection had been made the ground of a special demurrer to the declaration, it might perhaps have been held that the allegation is insufficient for that purpose. But the declaration does in fact allege that the company, after the passing of the act, "under and by virtue of the act did receive divers sums of money, out of which *they might* and ought to have paid and satisfied the plaintiff:" and we think this amounts in substance to an averment that the company had enough to satisfy the plaintiff's demand, and therefore is sufficient upon a general demurrer. And if in fact the company had never received money to such an amount as that out of it they *might* have paid the plaintiff's demand, the defendants could have traversed the averment: or, if they had received sufficient, but had expended what they received in satisfying other claimants who came equally with the plaintiff within the description contained in the 20th section, the defendants might have pleaded this special matter as an answer to the action.

4. As to the form of the action.

The last, and which appears the more important objection to the declaration, was, that the action was misconceived; for that, if any action is maintainable, it ought to have been an action on the case for the misapplication of the funds raised by the statute, but not an action of debt. That the plaintiff might have maintained an action on the

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Friday, Jan. 11th.

JONES *v.* CORRY and Others, Executors of WILKINS, Deceased.

An arbitrator, after the making of his award, with a view to enable one of the parties to take the opinion of the court upon his decision, stated to him the ground upon which he had proceeded, shewing that he had put an erroneous construction upon the order of reference:—The court set aside the award, though unexceptionable on the face of it.

BY an order of Nisi Prius, two actions—in one of which the plaintiff sought to recover from the defendants as executors the value of certain mason's work done by him to the testator's house in the lifetime of the testator, and in which a verdict was taken for the damages laid in the declaration—the other charging them in their individual capacity for work done since the testator's decease—and all matters in difference between the parties and the heir, who was made a party to the reference, were referred to a barrister. The arbitrator by his award directed that the verdict in the first action should stand for 295*l.*, and, as to the second action, that the plaintiff had no cause of action, and that the same should be discontinued: and as to the matters in difference between the plaintiff and defendants and the heir, he found that the plaintiff had no further demand or claim upon either of them: and he directed that the costs of the reference and of the award should be paid by the defendants and the heir in equal moieties.

Wilde, Serjeant, in Michaelmas Term last, obtained a rule nisi to set aside this award, on the ground that the arbitrator had exceeded his authority (33).—The affidavit upon which the motion was founded, stated, that, upon the reference, it was admitted by the plaintiff's attorney that the second action could not be supported, and that some parts of the work (though he could not distinguish what

(33) Under the rule of court of Easter Term, 2 Geo. 4, [and see Reg. Gen. Michaelmas Term, 10 Geo. 4—6 Bing. 348, 3 M. & P. 762], it is not sufficient to state in the rule nisi for setting aside an award "that the arbitrator has exceeded his authority;" at least if there be no affidavit stating the particular excess: it must be shewn how the authority has been exceeded. Boodle v. Davies, 3 Ad. & E. 200, 4 N. & M. 788.

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proceeded. To permit the arguments urged before the arbitrator to be brought to the notice of the court by the unsuccessful party would be dangerous and unseemly; for, then, many have been misunderstood, or might have been wholly disregarded by the arbitrator. It may be that the arbitrator has misdirected the law, still that is no ground for setting aside his award—*Campbell* v. *Twemlow*, 1 Price, 81; *Perryman* v. *Steggall*, 2 M. & Scott, 81, 9 Bing. 679, 2 Dow. 723; *Spurr* v. *Cardiff*, 2 Scott, 799, 2 New Cases, 511, 5 Dow. 625—unless it appear upon the face of the award, or by some act of his own in the exercise of his functions as arbitrator, that he has so done. How is a statement like that contained in the affidavit to be met? Is the arbitrator to be called upon to depose to the grounds upon which he proceeded in making his award? In *Gordon* v. *Mitchell*, 2 Moore, 241, it was expressly held that, if the terms of an award be clear upon the face of it, the court will not admit an affidavit of the arbitrator to explain his intention. It is upon the same principle that affidavits of jurymen are not received for the purpose of explaining their verdict. *Tindal*, C. J.—It appears that, when asked upon what ground he proceeded, and being told that the inquiry was made of him with a view to the matter being brought before the court, the arbitrator assigns one that is perfectly inconsistent with his award.] In *Williams* v. *Jones*, 5 M. & R. 3, it was held that an award made by a barrister cannot be questioned on the ground of any statement not appearing on the face of the award, or annexed to it. There, a dispute between the parties having been settled by an arbitrator, a second dispute between the same parties was referred to a second arbitrator, who made his award in favour of the defendant. The day before the second award was made the arbitrator wrote a letter to the plaintiff's attorney, stating that he felt himself bound to make an award in favour of the defendant, on the ground that the matter in dispute had arisen before the former

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reference, and that, although he thought the first arbitrator mistaken, he considered himself concluded by the award. Upon a motion to set aside the second award, on the ground that the arbitrator was mistaken in supposing that he was concluded by the first award, Littledale, J., said—"If you refer to a gentleman at the bar, you are bound by his decision, unless it appear on the face of the award, or of some paper annexed, that the arbitrator wishes to raise the question." [*Tindal*, C. J.—You might have asked the arbitrator whether or not the statement made by him was correctly represented in the affidavit (34).] That would be asking the court to give credence to a statement not made upon oath, in preference to a positive affidavit. [*Vaughan*, J.—The sole question is, whether the court can legitimately see that the arbitrator has exceeded the authority given to him by the order of reference.] If the matter be within the jurisdiction of the arbitrator, the court will not interfere, even though it clearly appear that the arbitrator has misdecided: neither can an award be set aside on mere surmise.

Wilde, Serjeant, in support of his rule, was stopped by the court.

TINDAL, C. J.—It appears to me that this award must be set aside, on the ground that the arbitrator has exceeded his authority. The plaintiff having done work upon the house of the testator, part in his lifetime, and part after his decease, brings two actions against the executors,

(34) On a subsequent day, *Williams* moved to open the rule, the arbitrator, who had only arrived in town since the rule was disposed of, offering to make an affidavit that no such conversation as that alleged in the affidavit on which the rule was obtained took place between him and the clerk to the defendant's attorney, but that he simply refused to give the clerk any answer.

The court negatived the application, drily observing that "the rights of third parties must not depend upon such uncertainties."

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in the one charging them as executors for the work done prior to the death of the testator, in the other charging them personally for that done since. For this latter demand there was no pretence, the heir alone being liable for that. A verdict was taken in the first action for the damages laid in the declaration, subject to a reference of both causes and of all matters in difference between the parties—the heir being allowed to come in as a party. The arbitrator, as to the second action, finds that the plaintiff had no ground of action, and directs it to be discontinued: but he directs that the verdict in the first action shall stand for 295*l.*; and, as to the matters in difference, he finds that the plaintiff has no further claim or demand upon the defendants or the heir; and he apportions the costs of the reference and award between these latter—thus giving a judgment against the executors for the entire sum due. In a conversation with the clerk of the defendant's attorney, it is sworn, the arbitrator stated that he conceived that he had authority thus to deal with the entire claim. It is said that we ought not to admit what the arbitrator has himself disclosed as the ground of his award, for the purpose of impeaching it. I agree that in ordinary cases we ought not, inasmuch as parties when they consent to refer themselves to the judgment of an arbitrator, constitute him the judge of the law as well as of the fact (35). But the present case has this peculiarity —when applied to for information as to the ground upon which he proceeded, and being told that the inquiry was made with a view to the opinion of the court being taken upon it, the arbitrator tells the party that he puts a certain interpretation upon the order of reference, and has decided accordingly. And it seems to me to be immaterial whether he tells the party this whilst the matter is pending or after the award is made. I am therefore of

(35) And this whether he be a lawyer or a layman.

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Saturday, Jan. 12th.

M'GEORGE *v.* EGAN.

In an action for a school bill, it appeared that the defendant's wife took the child (her niece) to the plaintiff's school, and that the defendant had visited her while there; but there was no evidence of any communication between the plaintiff and the parent of child:—Held, that the fact of the defendant having paid for articles for domestic use ordered by his wife, was evidence for the jury of her authority to charge him with the education of the child.

THIS was an action of assumpsit brought by the plaintiff, who kept a school, to recover a sum of 19*l.* 10*s.* for two months' instruction of "a person commonly known as and called Miss Rhodes," at the defendant's request.

At the trial before the undersheriff of Middlesex, it appeared that the child, who was the niece of the defendant's wife, was taken to the plaintiff's school by the latter, and that the defendant himself visited her once whilst there. The child's father was living when she was first placed at the school, but had died since; but there was no evidence of any communication between him and the plaintiff.

To shew a recognition by the defendant of the general authority of the wife to make contracts charging him, the plaintiff called several tradesmen, a grocer, a linen-draper, a carver and gilder, &c., who stated that they had executed orders given by the defendant's wife, and had received payment from the defendant. It was contended on the part of the defendant that this evidence was irrelevant to the question at issue.

The undersheriff, however, ruled it to be admissible; and he left the case to the jury, telling them, that, though it was the slightest case he had ever met with, yet he could not say there was *no* evidence for them.

A verdict having been found for the plaintiff—

Humfrey moved that it might be set aside, and a nonsuit entered, on the ground that there was no evidence to go to the jury of any recognition by the defendant of his wife's authority to bind him by the contract in question; and that the testimony of the tradespeople was improperly received, or, if admissible, was not evidence of an authority in the wife to bind the defendant by a contract of this sort, in the absence of an express assent on his part.

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Humfrey obtained a rule calling upon the plaintiff to shew cause why he should not pay to the defendant his costs, under the 6 & 7 Will. 4, c. cxx, the Blackheath Court of Requests Act.

By the 21st section of the act the commissioners are impowered " to decide and determine all disputes and differences between party and party in all actions or causes of debt," &c., not exceeding 5*l.* The 28th section provides that it shall and may be lawful for any person who shall have any debt or demand owing or due to or claimed or demanded by such persons, and for which debt or demand he shall claim any sum of money (not exceeding 5*l.*) from any person " residing, inhabiting, or being within the said hundred, or keeping or using any house or warehouse, or employed, working, or seeking a livelihood, or usually trading or dealing" within the hundred, to apply, &c. And the 74th section enacts, " that, if any action or suit for any amount recoverable in the said court of requests shall be sued or prosecuted in any of his majesty's courts at Westminster, or elsewhere out of the said court of requests, and it shall appear to the judge or judges of the court in which such action or suit shall be tried, that, at the time of commencing such action or suit, the defendant was within the jurisdiction of the said court of requests, and was liable to be warned and summoned before the said court for such debt or demand, then and in such case the said judge or judges shall not allow to the plaintiff or plaintiffs any costs of suit, but shall award the said plaintiff or plaintiffs to pay such costs to the defendant or defendants as such defendant or defendants shall justly prove before such judge or judges that he or they hath or have incurred and been put to in the defence of such action or suit."

Barstow shewed cause.—Under the 6 & 7 Will. 4, c. cxx, the defendant would clearly have been entitled to his costs —*Moore* v. *Jones*, 2 Dowl. 58; *Burton* v. *Campbell*, 5 Scott,

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evaded by preferring a claim for a larger sum than is really due.

VAUGHAN, J.—I am of the same opinion. If we were to put any other construction upon the act, we should be called upon in every case to try a question of reasonable or probable cause.

The rest of the court concurring—

Rule absolute.

Saturday, Jan. 12th.

TYLER *v.* CAMPBELL.

Costs of an attachment include all such as are fairly incidental to the attachment, and among others those of proceedings to clear the defendant of his contempt.

THE defendant having failed to deliver up to the plaintiff certain wines pursuant to an award, a rule nisi was obtained for an attachment. Upon shewing cause against the rule, it was alleged on the part of the defendant that the wines had been sold, whereupon the plaintiff consented to receive the proceeds: and the rule was made absolute, the attachment to remain in the office a given time, to enable the defendant to go before the Master and satisfy him that the wine had been sold, and for what price; in the event of his doing so, the attachment to be discharged, on payment of the costs of the attachment. The defendant not complying with the conditions imposed within the time limited, the attachment was put in course of execution. The defendant subsequently paid the value of a portion of the wine, and restored the residue.

The Master having, on taxing the costs, disallowed the expenses of the inquiry touching the alleged sale —

Wilde, Serjeant, on the part of the plaintiff, obtained a rule nisi for a review of the taxation.

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the carriage while she went into the shop to make purchases. There was no evidence of any inquiry having been made by the plaintiffs: but it appeared that the defendant had represented to them that she had considerable expectations from her grandfather. It further appeared that the mother was in desperate circumstances—her husband out of the country, and herself deeply involved in debt with all the tradespeople in the neighbourhood.

His lordship left it to the jury to say whether or not, regard being had to the apparent station of the defendant, the goods in question were necessaries.

The jury returned a verdict for the plaintiffs for 25*l.* 16*s.*, 10*l.* having been paid on account.

Hayes now moved for a new trial, on the ground of misdirection, and that the verdict was against the weight of evidence.—The defendant being at the time resident with her parent, the goods were primâ facie not necessaries, the presumption being that she was sufficiently provided by her mother: and therefore it was the plaintiffs' duty to make some inquiry, which they might easily have done; and the slightest inquiry must have satisfied them that it would not be proper to give the party credit. In *Ford* v. *Fothergill*, 1 Esp. 211, Peake, 229, which is the leading case upon this subject, it was held that those things are to be deemed necessaries, in order to charge an infant, which correspond with his real circumstances, not with his appearance in life. Lord Kenyon said—"that the question of necessaries was a relative fact (36) to be governed by the fortune or circumstances of the infant, and that proof of those circumstances lay on the plaintiff; that a person trusting an infant did it at his peril; and, though it had

(36) See Maddox v. Miller, 1 M. & S. 738. "The law lays infants under a disability of contracting debts except for bare necessaries, and even this exemption is merely to prevent them from perishing." Per Lord Hardwicke, in Brooke v. Gally, 2 Atk. 35.

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to the mother's inspection? And, if so, what inquiry could be necessary? The conduct of the mother sanctioned the fitness of the supply. Besides it appeared that the defendant represented to the plaintiffs that she had expectations from her grandfather, who was wealthy. Upon the whole I am clearly of opinion that the conduct of the parties precluded the necessity of making any inquiry; and consequently that there is no pretence for disturbing the verdict.

VAUGHAN, J.—I am of the same opinion. I subscribe most implicitly to the acknowledged rule that a tradesman is bound to make inquiry before he gives credit to an infant. Each case, however, must depend upon its own peculiar circumstances. Looking to the facts here—a young lady residing with her mother at the Brunswick Hotel, going in a carriage to a tradesman's shop, and ordering goods to be sent home to the hotel, where they must be seen by the mother, who on one occasion actually accompanies her daughter to the door of the shop—all these were clearly circumstances calculated to repress suspicion, and repel the necessity for rigid inquiry. This is an exception out of the general rule.

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Thursday, Jan. 17th.

On receiving the debt and costs, the plaintiff's attorney refused to allow certain interlocutory costs due to the defendant to be set off. Without making any formal demand of these costs, the defendant obtained a rule calling upon the plaintiff or his attorney to pay them:—The court made the rule absolute *without costs.*

ABERNETHY *v.* PATON.

THE plaintiff having signed judgment in this case pending a summons for further time to plead, Coltman, J., made an order for setting it aside for irregularity. A motion on the part of the plaintiff to set aside this order was on the last day of Trinity Term last (June 14th) discharged with costs—see 6 Scott, 586. The defendant's costs on that occasion were taxed at 14*l.* 0*s.* 6*d.*, but were not paid. A summons was afterwards taken out by the defendant, to stay proceedings on payment of debt and costs; and a second summons, to set off the costs of the motion against the costs of the cause. Upon this last mentioned summons no order was obtained, but an order was drawn up upon the first, to stay the proceedings on payment of debt and costs. The plaintiff's costs were afterwards taxed, and paid by the defendant under protest, he insisting upon his right to set off the interlocutory costs. No formal demand of the costs of the rule of the 14th June was ever made: but, in the last term—

W. H. Watson, on the part of the defendant, obtained a rule calling upon the plaintiff or his attorney to return the sum due to the defendant for the costs of that rule.—He submitted that the defendant was entitled to have the costs in question deducted, under the 93rd rule of Hilary Term, 2 Will. 4, which provides—"that no set-off of damages or costs between parties shall be allowed to the prejudice of the attorney's lien for costs in the particular suit in which the set-off is sought; provided, nevertheless, that interlocutory costs in the same suit, awarded to the adverse party, may be deducted."

Wilde, Serjeant, on a former day in this term, shewed cause.—The defendant was not entitled to have the costs

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davits, it appears to us that both parties have been in fault—the plaintiff, in not at once agreeing to allow the costs of the rule to be set off—and the defendant, because he comes to the court without a previous formal demand. We therefore think the justice of the case will be met by making this rule absolute for payment by the plaintiff or his attorney of the costs of the rule of the 14th June; but, as to the costs of this rule, that none shall be paid on either side.

Rule absolute accordingly.

Thursday, Jan. 17th.

Service of declaration &c. on the niece of the tenant (the tenant being ill), with an affidavit by the niece that she had delivered them to her aunt:—Held, sufficient for a rule absolute.

DOE d. EATON *v.* ROE.

GRAY moved for judgment against the casual ejector upon an affidavit stating a service of the declaration and notice upon the niece and servant of the tenant in possession, on the premises, the tenant being ill and not in a condition to be seen; and an affidavit of the niece that she had delivered them to her aunt.

PER CURIAM.—Take a rule.

Rule absolute (39).

(39) See Doe d. Sykes v. Roe, ante, p. 121.

Thursday, Jan. 17th.

In an action for slander imputing to the mayor of Maidstone perjury in his examination before an election committee, the venue having been changed from London to Maidstone—The court (upon terms) directed it to be brought back, it being sworn, that, by reason of the great political excitement at and in the neighbourhood of Maidstone, and the manner in which the matter had been handled in the local newspapers, it was impossible that the plaintiff could have an impartial trial at Maidstone.

PYBUS *v.* SCUDAMORE.

THIS was an action of slander brought by the late Mayor of Maidstone against the town clerk, for charging him with

having been guilty of perjury before an election committee. The venue was originally laid in London, but was changed to Maidstone upon the usual affidavit.

Wilde, Serjeant, in Michaelmas Term last, obtained a rule nisi to restore the venue to London, upon affidavits stating, that, by reason of the great political excitement at and in the neighbourhood of Maidstone, and the manner in which the matter had been handled by the local newspapers, it was impossible that the plaintiff could have a fair and impartial trial of his cause there; and offering to pay all the extra costs occasioned by the application.

Thesiger and *Channell* now shewed cause.—Mere local interest or local excitement affords no sufficient ground for stigmatizing a whole county: the court, by restoring the venue upon these affidavits, would be giving countenance to an idle suggestion that there cannot be found a special jury of the county of Kent (for, it is sworn that the defendant intends to apply for a special jury) sufficiently unprejudiced or honest to respect their oath. In *Hill* v. *Payne*, 3 Dowl. 695, the defendant had changed the venue to the county where the cause of action arose; and the court of Exchequer refused to grant a rule to bring it back to the county where it was originally laid, upon an affidavit that the action was brought to recover the balance of an election dinner, and that the defendant was treasurer of the county, and an electioneering agent, and a person of great influence there—it being a special jury cause. In *Briscoe* v. *Roberts* (not reported) the same court refused to change the venue from Surrey to London, in an action of trespass for erecting booths on Epsom downs, upon a suggestion that the plaintiff, who was one of the members for the county, possessed great influence there. So, in *Davies*, dem., *Lowndes*, ten., 6 Scott, 435, 4 New Cases, 711, this court refused to direct the jury process on the trial at bar

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of a writ of right for the recovery of lands in Buckinghamshire, to be awarded to the sheriff of Middlesex, upon a suggestion that the tenant was possessed of large property and great popularity and influence in the former county, and the demandants poor and obscure persons resident in Wales. To induce the court to interfere in such a case, the affidavits must shew a substantial and an overruling necessity for it.

Besides, in this case much will depend upon a view of the spot on which the plaintiff sat at the time it is alleged in his evidence before the committee that he saw what he there deposes to—a certain individual going up a certain staircase. It is sworn that the defendant means to have a view: and the court have no power to send a London jury into Kent for the purpose of a view (40). It also appears that all the witnesses reside at or near Maidstone.

(40) The 6 Geo. 4, c. 50, s. 23, which regulates the granting of views, provides, that, "where in any case, either civil or criminal, or on any penal statute, depending in any of the courts of record at Westminster, or in the counties palatine, or great sessions in Wales, it shall appear to any of the respective courts, or to any judge thereof in vacation, that it will be proper and necessary that some of the jurors who are to try the issues in such case should have the view of the place in question, in order to their better understanding the evidence that may be given upon the trial of such issues, in every such case such court, or any judge thereof in vacation, may order a rule to be drawn up, containing the usual terms, and also requiring, if such court or judge shall so think fit, the party applying for the view to deposit in the hands of the undersheriff a sum of money to be named in the rule, for payment of the expenses of the view, and commanding special writs of venire facias, distringas, or habeas corpora, to issue, by which the sheriff or other minister to whom the said writs shall be directed, shall be commanded to have six or more of the jurors named in such writs, or in the panels thereto annexed (who shall be mutually consented to by the parties, or, if they cannot agree, shall be nominated by the sheriff or such other minister as aforesaid), at the place in question, some convenient time before the trial, who then and there shall have the place in question shewn to them by two persons in the said writs named, to be appointed by the court or judge; and the said sheriff or other minister who is to execute any such writ shall, by a special return upon the same, certify that the view hath

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Wilde, Serjeant, in support of his rule.—Changing the venue in a case like this would cast no stigma on the jurymen of the county: it is a mockery and an insult to truth to say that party feeling and political bias do not operate (unconsciously) upon the minds of juries. *Hill* v. *Payne* and *Davies* v. *Lowndes* were cases of the slightest possible description: and, with respect to *Briscoe* v. *Roberts*, the facts of which are not before the court, the danger of bias would rather seem to be the other way. Though many cases may be cited where applications like this have been unsuccessful, yet there are not wanting instances where they have been acceded to upon slighter grounds than those disclosed here. In *Walker* v. *Ridgway*, 11 Moore, 486, which was an action by a clergyman against a farmer for improperly setting out his tithes, the jury having found a verdict for the defendant contrary to the opinion of the judge, a new trial was granted; and anonymous letters having been inserted in the newspapers of the county where the cause was tried, reflecting on the character of the plaintiff as a clergyman, the court ordered the venue to be changed, though the defendant expressly denied that the letters were so inserted with his knowledge, privity, or consent. Best, C. J., there says: "Although the court have a discretionary power to change the venue, they ought not to exercise that power except under very special circumstances. The present application is founded on a very extraordinary charge, not affecting the parties to the suit, but persons wholly unconnected with it, viz. the editors of certain provincial newspapers, who, by their improper conduct, are said to have exercised an undue influence over the minds of the inhabitants of the county wherein the

been had according to the command of the same, and shall specify the names of the viewers." And see 4 Anne, c. 16, s. 8, and 3 Geo. 2, c. 25, s. 14.

"The rule for a view may in all cases be drawn up by the officer of the court, on the application of the party, without affidavit or motion for that purpose." Reg. Gen. Hilary Term, 2 Will. 4, I, 63.

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cause is to be tried. The publication of several of the letters in question tends to throw discredit and opprobrium on the character of the clergy in general, who ought not only to be secured against all attack, but upheld and supported by every possible means: and these letters are calculated not only to have this bad effect, but also of necessity to prejudice the minds of the neighbourhood against the plaintiff, who belongs to that sacred body. We cannot say how far the poison of these publications may be disseminated, and we will therefore take care that this issue shall be removed out of the influence of their venom." In *The King* v. *Hunt*, 3 B. & Ald. 444, the court permitted a suggestion to be entered on the record for the purpose of carrying the trial of a misdemeanor into an adjoining county, there appearing upon the affidavits a reasonable ground for believing that a fair and impartial trial could not be had in the county where the venue was laid—observing "that it was of the highest importance that the administration of justice should not only be pure, but above all suspicion; and that, as upon the affidavits it did appear, that, if the trial took place in the county of Lancaster, it might possibly happen that persons might be summoned on the jury whose opinions might be tainted with very strong prejudice, but whom it would nevertheless not be competent for the defendant to challenge, they thought that the application should upon certain terms be granted: adding, that those terms became necessary only in consequence of the gross neglect on the part of the defendants in having suffered nearly two terms to elapse before they applied to the court." In *Petyt* v. *Berkeley*, Cowp. 510, which was an action brought by a Gloucestershire justice of the peace for words spoken by the defendant upon the hustings at the time of the election of a member for the county of Gloucester, the defendant himself being then one of the candidates—a rule having been obtained by the defendant, upon the common affidavit, "to change the

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venue from Middlesex to Gloucestershire where the cause of action arose—upon a rule to set aside that rule, Lord Mansfield said: "In all cases, one would wish, not only a fair, but an unsuspected trial. Here, the very nature of the action, the event which gave rise to it, and the circumstances of the party, shew there cannot be a satisfactory trial. Of all trials, the greatest latitude for bias is open in an action for words occasioned by election heat. A man may very safely swear there cannot be a fair trial upon hasty words uttered at the time of the poll. The Master, when he takes up the freeholders' book, must pitch on men who are friends of one side or the other." And every day's experience shews us that electioneering has lost none of its "heat" since the days of Lord Mansfield.

TINDAL, C. J.—I must confess that my mind has fluctuated during the course of the argument: but, upon the whole, I am unable satisfactorily to distinguish this case from that of *Walker* v. *Ridgway*, 11 Moore, 486. If therefore any mode can be devised to save the defendant harmless against any increased expense, I think he will have no right to complain if in the exercise of our discretion it seems meet to us to direct the trial of this cause to take place without the possible influence of local prejudice. Upon the plaintiff consenting to a view, and undertaking to pay all the costs of the view and of the trial beyond what would have been incurred had the trial taken place at Maidstone, the venue may be restored to London.

The rest of the court concurring, and the proposed terms being acceded to on the part of the plaintiff, the rule was made—

Absolute.

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Thursday, Jan. 17th.

Where the sum taxed off an attorney's bill is less than a sixth, this court will, in the exercise of the discretion given to them by the statute 2 Geo. 2, c. 23, s. 23, order the client or the attorney to pay the costs of taxation according as they shall find the bill reasonable or unreasonable.

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THE plaintiff's attorney delivered him a bill of costs, not signed (the plaintiff having waived the delivery of a signed bill), the sum total of which was 977*l.* 10*s.* Of this sum 637*l.* consisted of payments made by the attorney on behalf of the client. Upon taxation the Master took off 147*l.* 10*s.* (being one sixth of the whole bill, less 15*l.* 8*s.* 4*d.*). The order referring the bill to be taxed was drawn up on Mr. Russell's undertaking to pay what should be found due.

By the 2 Geo. 2, c. 23, s. 23 (41), the respective courts are authorized to award the costs of taxation to be paid by the parties "according to the event of the taxation of the bill, that is to say, if the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of the taxation; but, if it shall not be less, the court, *in their discretion*, shall charge the attorney or client, in regard to the reasonableness or unreasonableness of such bills."

Humfrey, in the last term, obtained a rule calling upon the client to shew cause why he should not pay the costs of the taxation, less than one sixth of the whole bill having been taken off.

Wilde, Serjeant, now shewed cause.—The court has no direct power to refer an attorney's bill for taxation, except under the authority of the statute—*Howard* v. *Groom*, 4 Dowl. 21 (42). [*Bosanquet*, J.—It has been so decided,

(41) Made perpetual by the 30 Geo. 2, c. 19, s. 75.

(42) In Clarkson v. Parker, 4 M. & Welsby, 532, it was held that the courts have a general jurisdiction independently of the statute to order an attorney to deliver a bill of costs to his client, and account for monies received; although they have no power to order it to be taxed, except in the cases provided for by that act.

after conference with all the judges.] Here, the parties, by waiving one of the conditions of the statute, have taken the case out of its provisions altogether. In *Gerrard* v. *Arnold*, 6 Dowl. 336, it was held, that, where, on reference of an attorney's bill to taxation, the parties agree to waive the delivery of a signed bill, primâ facie they waive the operation of the 2 Geo. 2, c. 23, s. 23, as to payment of the costs of taxation. If the court are to exercise a discretion in the matter, this clearly is not a case in which they will feel disposed to exercise it in the attorney's favour. The items in the bill, independent of disbursements, amount only to 340*l.* 10*s.*; and of this the Master has taxed off 147*l.* 10*s.* In *Elwood* v. *Pearce*, 1 M. & Scott, 159, 8 Bing. 83, this court refused to allow an attorney his costs of taxation, where the Master had taken 24*l.* 14*s.* 8*d.* off a bill amounting to 184*l.* 14*s.* 8*d.* And Tindal, C. J., says:—"The statute directs, that if, upon taxation, more than one sixth part of an attorney's bill be deducted, the attorney shall pay the costs of taxation; but that, if less than one sixth be deducted therefrom, the court may in their discretion charge the client. No general rule has been laid down upon the subject; but I think this is a case in which the court may exercise a discretion. The amount deducted being so nearly a sixth, we ought not to be called upon by an officer of the court to allow his costs of taxation. If about 5*l.* more had been taken off by the Prothonotary, the attorney would have had to pay costs."

Humfrey, in support of his rule.—The form of the order shews that the parties intended to save the statute in all but the condition as to the delivery of a *signed* bill: the act being in other respects complied with, we consent to the order for taxation notwithstanding no signed bill has been delivered. [*Tindal*, C. J.—I doubt our jurisdiction unless all the requisites of the statute have been complied

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with. *Gerrard* v. *Arnold* is a strong case.] All that the court decide there, is, that it must be made appear to the court that the parties intended to proceed under the statute: now, the circumstance of our requiring the undertaking to pay what should be found due to be inserted in the order, shews that we intended in all other respects save the one to proceed under the statute.—Then, as to the *discretion* of the court.—[*Bosanquet*, J.—In *Baker* v. *Mills*, 2 Dowl. 382, where the Master in taxing a bill of costs amounting to 272*l.*, taxed off a sum of 42*l.*, the court of Exchequer held the attorney liable to the costs of the taxation.] That case, as well as the case of *Elwood* v. *Pearce*, was virtually overruled by the court of King's Bench in *Mills* v. *Revett*, 3 N. & M. 767. It was there held, that, where less than one sixth is, upon taxation, struck off an attorney's bill, the court will, as a matter of course, order the client to pay the costs of taxation. Taunton, J., there says: "If the bill taxed be less by a sixth part, the attorney is to pay the costs of taxation; but if it shall not be less, the court may order the attorney to pay the costs of taxation according to the reasonableness or unreasonableness of the bill. I believe the provision of the statute has always been considered *reciprocal*. If *more* than one sixth is taken off, the attorney pays the costs of taxation; if less, the client." And Williams, J., says: "With respect to the point as to the *discretion* given to us by the statute, it seems to me that the safest course in regulating the discretion of the court, is, to take the converse of the rule laid down in the statute." And in *Rogers* v. *Peterson*, 4 M. & Welsby, 588, the court of Exchequer held that an attorney is not compellable to pay the costs of taxation, on the ground of more than one sixth having been taken off his bill, unless there have been either an undertaking by the party to pay the bill, or money brought into court, with an agreement by the party that it shall be appropriated to that purpose; since otherwise it is not within the sta-

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tute. It is extremely desirable that the decisions of the several courts upon this point should be uniform.

TINDAL, C. J.—It appears to me that the court are imperatively called upon by the statute, where the sum taken off an attorney's bill on taxation is less than one sixth, to exercise a discretion as to which party shall pay the costs of the taxation, regard being had to the reasonableness or unreasonableness of the bill. The doctrine laid down by the court of King's Bench in *Mills* v. *Revett*, seems to me to be inconsistent with the words of the statute, and an undue shrinking from a duty imposed by it: I think that, in the execution of that duty, we are bound to look into the circumstances of the case, and to decide whether the bill is a reasonable one or not. Deducting the amount of disbursements (43), the sum taxed off considerably exceeds a fourth of the residue of the bill; and there is no imputation upon the manner in which the taxation has been conducted. How can we say that such a bill is a reasonable one? One item in particular strikes me with great surprise. There is a charge of nearly 40*l.* for a consultation, including a stay of the attorney in town for nine days! Without pursuing the inquiry further, that is enough to satisfy me that the bill is unreasonable, and that the costs of taxation ought to be paid by the attorney. The rule must be discharged.

VAUGHAN, J.—I am of the same opinion. The statute is imperative in the one event, and discretionary in the other. I am not prepared to adopt the rule laid down in

(43) If a client in the course of a cause advances money to his attorney for specific disbursements in the cause, those disbursements must nevertheless be included in the bill of costs. Therefore, where, upon taxation, a sum was deducted less than one sixth of the amount of the bill delivered including those disbursements, the court ordered the client to pay the costs of the taxation. Hindle v. Shackleton, 1 Taunt. 536.

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Mills v. *Revett*, that the provision is reciprocal. Looking at the bill, there is clearly no pretence for allowing the attorney the costs. The charges are most unreasonable and extravagant.

BOSANQUET, J.—If the legislature had drawn any precise line for our guidance, I should have been extremely glad to be relieved from the exercise of a discretion in the matter. But they have not thought fit to do so. The statute authorizes the respective courts to award the costs of taxation to be paid by the parties "according to the event of the taxation of the bill, that is to say, if the bill taxed be less by a sixth part than the bill delivered, then the attorney or solicitor is to pay the costs of the taxation; but, if it shall not be less, the court, *in their discretion*, shall charge the attorney *or* client, in regard to the reasonableness or unreasonableness of the bill." I do not feel myself at liberty to withdraw from exercising that discretion. I agree with the rest of the court in thinking that the bill is an unreasonable one, and that the costs of taxation ought to be borne by the attorney.

ERSKINE, J.—I am of the same opinion. It is impossible to look at this bill, and to say that this is a case in which the client ought to be called upon to pay the costs of the taxation.

Rule discharged (44).

(44) In Tidd's Practice, 9th edit. p. 336, it is said—"If a sixth part of the bill be taken off, the attorney is to pay the costs of taxation; but, if less, the costs are in the discretion of the court. In the exercise of this discretion, however, the courts are governed by the statute: and accordingly, the costs of taxation have been always reciprocally given to the client or attorney, as a sixth part has or has not been taken off"—citing 5 B. & C. 760; 8 D. & R. 589; Cas. Pr. C. P. 78; Pr. Reg. 36, Barnes, 118; Barnes, 147, 148; 1 M'Clel. & Y. 354: and referring to 14 Ves. 154; 3 Ves. & B. 141; 2 Madd. Rep. 329; Buck, 129.

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Tuesday, Jan. 22nd.

Quære, whether the judge, having granted a certificate under the 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs in an action of trespass, has power to revoke it?

If so, such power must be exercised within a reasonable time—at all events before the expiration of the time for signing final judgment.

WHALLEY *v.* WILLIAMSON.

THIS was an action of trespass brought against the sheriff of Staffordshire, for breaking and entering the plaintiff's dwelling-house. At the trial before Alderson, B., at the Spring Assizes for the county of Stafford in 1836, a verdict was found for the plaintiff—damages, 1*s*. The learned judge was applied to on the part of the defendant to certify under the statute 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs (45). His lordship took time to consider; and on his arrival at Gloucester, the next assize town, he indorsed his certificate upon the record. Towards the close of Easter Term, 1837, an application was made to the learned judge to rescind his certificate, upon an affidavit that the plaintiff bonâ fide meant to try a question touching the freehold. The learned judge, after hearing the parties, acceded to the application.

Ludlow, Serjeant, in the last term, obtained a rule calling upon the defendant to shew cause why the plaintiff's costs should not be referred for taxation.

R. V. Richards, F. V. Lee, and *Pike,* now shewed cause.—The certificate, when once given, is irrevocable, though, according to *Foxall* v. *Banks,* 5 B. & A. 536, it is not necessary

(45) The words of the section are—"If upon any action personal to be brought in any her majesty's courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges for the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court shall not amount to the sum of 40*s*. or above, that, in every such case, the judges and justices before whom any such action shall be pursued, shall not award for costs to the party plaintiff any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions."

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that it should be given immediately. The authority of the judge to try the cause depends wholly upon the commission. After the expiration of the commission his power over the records is gone. Could a Serjeant exercise any control over the record in a cause tried before him, after the commission enabling him to sit as judge has expired? or, would it be competent to a judge who has retired from the bench to recall any certificates given by him when in office? At all events, it is clearly too late, when by the practice of the court the time for moving for a new trial is gone by. In *Waggett* v. *Shaw*, 3 Camp. 316, upon an application, under the 24 Geo. 2, c. 18, for a certificate that the cause was a proper one to be tried by a special jury, made *the day after the trial*, Lord Ellenborough said: "The statute provides that 'the judge before whom the cause is tried (if he sees fit) shall *immediately after the trial* certify in open court under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury.' I do not think I have authority to grant such a certificate the day after the trial, and I have always been in the habit of refusing applications so made" (46). And though the rule is not so strict now, still it is only by consent that it is relaxed. In *Anderson* v. *Sherwin*, 7 C. & P. 527, the application to the judge to revoke the certificate was made whilst the commission was yet in force; but here, not only had the commission expired, but fourteen months had elapsed, including four terms and two subsequent commissions.

(46) Appended to that case is the following note:—"But a certificate under 43 Eliz. c. 6, to deprive the plaintiff of costs, the damages being under 40*s*., may be granted at any time after trial—Holland v. Gore, 3 T. R. 38, n. So of a certificate under 7 Jac. 1, c. 5, to entitle the defendant to double costs—Harper v. Carr, 7 T. R. 448. The same of a certificate under 22 & 23 Car. 2, c. 9, that a battery was proved, or that the title of the land came in question—Butler v. Cozens, 11 Mod. 198. And the like as to a certificate under 8 & 9 Will. 3, c. 11, that the trespass was wilful and malicious—Swinnerton v. Jervis, 6 T. R. 12; Harper v. Carr, 7 T. R. 449."

Besides, the point was not discussed there. When the record is returned to the court, the judge who presided at the trial has no control over it for any purpose. And it cannot be expected, that, after such a lapse of time as in this case, the judge could bear in his mind the various circumstances, such as the demeanour of witnesses, and so forth, which would influence his judgment in the granting or withholding the certificate.

Ludlow, Serjeant, and *Carrington*, in support of the rule.—The record is not yet in court. *Anderson* v. *Sherwin* is a distinct and conclusive authority that the certificate is revocable. It is clearly competent to the judge who has certified under this statute to rescind his certificate at any time before final judgment. The difficulty as to the length of time, therefore, cannot apply to this case. In *Foxall* v. *Banks*, 5 B. & Ald. 536, it was held that a certificate to deprive a plaintiff of costs might be indorsed on the postea *after costs had been taxed.* In *Woolley* v. *Whitby*, 4 D. & R. 147, 2 B. & C. 580, it was held that a judge's certificate that a trespass is wilful and malicious, to entitle a plaintiff to his full costs, under the 8 & 9 Will. 3, c. 11, s. 4, need not be granted at the time of the trial in open court, but may be granted at any time between verdict and final judgment. Abbott, C. J., there says: "I am of opinion, upon the construction of this section, that, if it should appear to the judge that the trespass was wilful and malicious, the certificate need not be granted at the time of the trial in open court, but may be granted at any intermediate time between verdict and judgment. That seems to me to be the best and most reasonable construction, because it enables the judge to take a little time to consider in what manner his discretion shall be best exercised upon the whole review of the case, instead of calling upon him to act, perhaps, at a late hour of the night, when his attention

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is fatigued, and when he has not the best means of duly considering in what manner his discretion should be exercised. This appears to me to be the soundest and truest construction of the statute." So, in *Johnson* v. *Stanton*, 4 D. & R. 156, 2 B. & C. 621, it was held, that, under the statute 22 & 23 Car. 2, c. 9, a judge's certificate for costs in actions of assault and battery, may be granted at any time between verdict and final judgment. In *Bonfield* v. *Milner*, 2 Burr. 1098, and *Mace* v. *Lovett*, 5 Burr. 2833, the proceedings were allowed to be amended, expressly on the ground that they were on paper, and not in the shape of a permanent record. In determining this case, the court will not fail to bear in mind that the power here exercised is one that is not likely to be exercised without discretion.

TINDAL, C. J.—It appears to me that the time within which a certificate under the statute 43 Eliz. c. 6, s. 2, may be granted, is a totally different subject of inquiry from the time within which it may be rescinded. When granted, the certificate is notice to the defendant that he will not be called upon to pay costs; therefore, if the judge should see fit to change his opinion, the fact should be intimated to the parties within a reasonable time: and, in my judgment, a time posterior to the time allowed by the ordinary course of practice of the court for signing final judgment, cannot be said to be reasonable. It is true there is nothing in the statute expressly authorizing the revocation of the certificate: but it seems to me to be only reasonable that a power of revocation should exist where on further consideration the certificate is found to have been made improvidently. I do not, however, feel it necessary now to determine that question: it is enough for the present to say that the power, if it exist at all, must be exercised within a reasonable time. The associate, in the ordinary course, makes a minute of the certificate, which is afterwards in-

dorsed on the Nisi Prius record, and delivered over in due season to the party who obtains the verdict. If the fourth day of the ensuing term be allowed to pass over before the certificate is revoked, the defendant will be saddled with costs from which he had supposed himself to be relieved, and be deprived of the power of moving for a new trial, which but for that circumstance he might have done. Without, therefore, determining whether or not the certificate may be revoked at all, I am clearly of opinion that the authority to revoke has not in this case been exercised within a reasonable time; and consequently that the rule calling upon us to direct the plaintiff's costs to be taxed must be discharged.

VAUGHAN, J.—I am of the same opinion. It is somewhat singular that *Anderson* v. *Sherwin* is the only instance upon record of this assumed power of revocation having ever before been called into action. It is perfectly clear that the judge is under this statute at liberty to exercise his discretion in granting or withholding a certificate at any time before final judgment is signed. But I for one must protest against being understood to admit the existence of a power at any time to rescind a certificate when once deliberately granted. If one certificate may be rescinded, another may be granted: how long, then, is the matter to remain unsettled? In *Anderson* v. *Sherwin*, the power does not seem to have been at all questioned. See the manifest injustice that must be inflicted upon the defendant from admitting such a doctrine in this case. He would naturally be induced by the certificate being granted not to move for a new trial. The certificate being rescinded, and the time for moving gone by, how is he to be restored to his rights? It is perfectly clear, at all events, that, if revocable at all, the certificate must be revoked within a reasonable time. Is it reasonable that the plaintiff's attorney should be permitted to keep the postea in his pocket for fourteen

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months, and then call upon the judge to recall a solemn act? I think not.

BOSANQUET, J.—I am also of opinion that the power to rescind a certificate granted under the 43 Eliz. c. 6, s, 2, if it exist at all, is one that must be exercised within a reasonable time. In *Anderson* v. *Sherwin*, though a term had elapsed before the certificate was recalled, there had been no intermediate Assize: consequently, the commission under which the learned judge acted was still in force (47). I give no opinion as to whether or not the judge has power to rescind at all. Cases may arise in which it would be convenient that such a power should exist: but still the exercise of it must not be unreasonably deferred. Two cases have been relied on as authorities to shew that certificates under the 22 & 23 Car. 2, c. 9, and the 8 & 9 Will. 3, c. 11, s. 4, may be granted at any time before final judgment. But there is nothing in the facts of those cases to warrant the conclusion: in the one, *Johnson* v. *Stanton* the certificate was granted *four days after the trial;* and in the other, *Woolley* v. *Whitby*, the application for the certificate was made immediately after the verdict was pronounced; but, the judges, entertaining a doubt whether the case was within the statute, reserved

(47) This can hardly be correct. Blackstone, treating of the several authorities by virtue of which the judges sit on circuit, says the fifth is, "That of Nisi Prius, which is a consequence of the commission of assize being annexed to the office of those justices by the statute of Westminster 2, 13 Ed. 1, c. 30. And it impowers them to try all questions of fact issuing out of the courts at Westminster, that are then ripe for trial by jury. The original of the name is this: all causes commenced in the courts of Westminster-Hall are by the course of the courts appointed to be there tried, on a day fixed in some Easter or Michaelmas Term, by a jury returned from the county wherein the cause of action arises; but with this proviso, nisi prius justitiarii ad assisas capiendas venerint—unless before the day prefixed the judges of assize come into the county in question. This they are sure to do in the vacations preceding each Easter and Michaelmas Terms, and there dispose of the cause."

the point for consideration, and the certificate was in fact not granted until some time in the ensuing term. In the report of *Woolley* v. *Whitby* in 4 D. & R. 153, Abbott, C. J., is made to say that "the certificate need not be granted at the time of the trial in open court, but may be granted at any intermediate time between verdict and judgment." That, however, as I have already observed, is not warranted by the facts, and is not to be found in the report of the same case in 2 B. & C. 580; where the learned Chief Justice says—"The sound construction of the enactment appears to me to be, that, if at the trial the trespass appears to have been wilful, the judge may grant his certificate *at any convenient time*. This certainly is the most proper construction, inasmuch as it gives the judge time for consideration, which he ought to have for the due exercise of the discretion vested in him by the statute." And though, in the marginal note of the report of *Johnson* v. *Stanton*, in 4 D. & R. 156, it is also stated that the certificate under the 22 & 23 Car. 2, c. 9, may be granted at any time between verdict and final judgment, nothing is to be found in the body either of that report or of the report of the same case in 2 B. & C. 621, to bear out the statement. I think it is pressing those cases too far to cite them as authorities to shew that the judge has power either to *revoke* or to *grant* a certificate at any time before final judgment. If the authority to revoke exists at all, it must be exercised within a reasonable time; and here the revocation was clearly too late.

ERSKINE, J.—I am of the same opinion. The cases referred to as to the amendment of the postea according to the notes of the judge, have no application. There the judge has no discretion to exercise: the matter is merely referred to him because he has the best means of knowing what really passed at the trial. If the judge has the power my Brother Alderson has here assumed, he must at all

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events exercise it in a reasonable time. It is enough for the present to say that the reasonable limit has in this case been exceeded.

Rule discharged (48).

(48) See Twigg v. Potts, 4 Dowl. 266; Cann v. Facey, 5 Nev. & M. 405, 4 Ad. & E. 68.

Tuesday, Jan. 22nd.

A commission for taking the acknowledgment of a married woman under the statute 3 & 4 Will. 4, c. 74, was addressed to "*Judge* M'Roberts and W. Pythian," Illinois, in the United States, and was returned certified by "W. Pythian and *Samuel* M'Roberts:"—The court required an affidavit shewing the identity of Judge M'Roberts and Samuel M'Roberts.

And *semble*, that an affidavit verifying the certificate of acknowledgment is properly sworn before a notary public at that place.

Ex parte MARY ANN MANN.

A COMMISSION under the 3 & 4 Will. 4, c. 74, to take the acknowledgment of Mrs. Mann, was addressed to "*Judge* M'Roberts and William Pythian, Danville, in the state of Illinois, U. S." It was returned to this country certified by "W. Pythian and *Samuel* M'Roberts." The affidavit verifying the certificate of acknowledgment was sworn before a notary public.

Biggs Andrews moved that the officer might be directed to file the certificate.—He cited *Lovibond* v. *Morshead*, 2 New Rep. 57, where the affidavit of acknowledgment of a fine made by one of the commissioners in France, but not signed, appearing to be in the same handwriting as his signature to the acknowledgment at the foot of the præcipe and concord, and indorsement of the writ; and such affidavit having been taken and attested in France by two English magistrates, on account of an exorbitant demand of per-centage on the part of the French officer authorized to take affidavits, the court allowed the fine to pass. And *Domville*, dem., *Kinderley*, ten., *Collier*, vouchee, 3 Taunt. 275, where it was held, that, if a warrant of attorney for suffering a recovery be acknowledged in a part of the East Indies far distant from the residence of any notary public or British magistrate, an affidavit of the acknowledgment made before a British consul or agent there will suffice.

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Ex parte MANN.

He submitted that the commissioner M'Roberts was sufficiently identified, and the affidavit sworn in the most formal manner the circumstances of the case would admit of.

TINDAL, C. J.—I think we ought to require an affidavit from some competent person, that Judge M'Roberts and Samuel M'Roberts are one and the same person, and that notaries public are authorized to take affidavits in America.

On a subsequent day *Andrews* produced an affidavit stating these facts, and also that, on inquiry of the American minister, the deponent was informed that it is by no means unusual in some parts of the United States for the judges to practise as counsel. The rule was thereupon—

Granted (49).

(49) See Ex parte Hutchinson, 1 M & P. 559, where it was held that a British consul at a foreign port has no authority, under the statute 6 Geo. 4, c. 87, s. 20, to administer an oath of the acknowledgment of a party levying a fine. And see Hack, plt., M'Gregor, def., 4 M. & P. 9; Anonymous, 1 M. & Scott, 54.

DOE *d.* WILLIAMS and Another *v.* LLOYD.

Tuesday, Jan. 22nd.

The court refused to change the venue from Radnor to Hereford, on the ground that the number of special jurymen in the former county does not exceed twenty-nine.

THIS was an action of ejectment brought by the lessors of the plaintiff, the trustees for a society of Wesleyan methodists, to recover possession of lands formerly the property of one Lloyd, a clergyman of the Established Church, which they claimed under a grant executed by him about two years before his death. The defendant claimed as Lloyd's heir-at-law, alleging the conveyance to be fraudulent.

Upon an affidavit stating the above facts, and that the defendant, assisted by his friends and neighbours, had taken forcible possession of the property; that there were only twenty-nine special jurymen in the county of Radnor; that the principal part of them resided in the neighbour-

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hood where the property was situate; that the suit had caused considerable excitement there; that a subscription had been set on foot amongst the neighbours to aid the defence, and every attempt made to excite prejudice against the lessors of the plaintiff; that the defendant's attorney was a person exercising great influence at Presteign, and held many mortgages upon property near the property in question, &c. &c.—

Wilde, Serjeant, on behalf of the lessors of the plaintiff, moved for leave to enter a suggestion on the roll, in order to have the trial at Hereford, on the ground that an impartial trial could not be had in Radnorshire.

Evans now shewed cause, upon an affidavit contradicting all the material allegations in the affidavit upon which the rule was obtained, except as to the number of special jurymen in the county of Radnor.

Wilde, Serjeant, in support of his rule, submitted that the circumstance of there being so limited a number of special jurymen in the county, was of itself almost reason sufficient for granting the application.

TINDAL, C. J.—I do not think ground enough is laid to induce us to interfere to put the defendant to the expense and inconvenience of going out of his county. It seems to me, that, if we were to accede to the application, we should in effect be deciding that no special jury cause shall for the future be tried in the county of Radnor.

VAUGHAN, J., and BOSANQUET, J., concurred.

ERSKINE, J.—The rule was granted principally on the faith of the suggestion that a subscription had been raised in the neighbourhood to aid the defence of the action.

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But the knowledge of that is not brought home to the defendant.

Rule discharged (50).

(50) At the trial at the Spring Assizes at Radnor, in 1839, a verdict was found for the lessors of the plaintiff. In the following term, a rule nisi was granted for a new trial, on the ground of misdirection; which rule was made absolute at the sittings in banc after Trinity Term, 1839. Vide post.

RIPPON *v.* DAWSON.

Friday, Jan. 22nd.

IN the writ of summons in this case the defendant was described as of "Newcastle-upon-Tyne, in the county of Northumberland." Coltman, J., set aside the writ on the ground that this description was insufficient, Newcastle-upon-Tyne being a county of itself.

"Newcastle-upon-Tyne, in the county of Northumberland," is a sufficient description of a defendant's residence, in a writ of summons, since the 2 & 3 Will. 4, c. 64, by Shed. O. 26, of which Newcastle-upon-Tyne is made to comprise certain townships that are not within the town and county of the town.

Corrie, on a former day in this term, obtained a rule nisi to set aside the order of Coltman, J. He submitted, that, inasmuch as by the 2 & 3 Will. 4, c. 64, Sched. O. 26, Newcastle-upon-Tyne is declared to consist, besides the town and county of the town of Newcastle, of the several adjoining townships of Byker, Heaton, Jesmond, Westgate, and Elswick, the description of the defendant's residence in the writ was not necessarily erroneous: and he cited *Jelks* v. *Fry*, 3 Dowl. 37, where Littledale, J., is said to have held "Yorkshire" to be a good description of a defendant's residence, although he resided at Kingston-upon-Hull, if he might be supposed to be resident in the former county.

Wilde, Serjeant, shewed cause.—The description of the party's residence is clearly incorrect. The statute referred to declares that certain townships in the county of Northumberland shall form part of the parliamentary borough

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of Newcastle-upon-Tyne; but no part of the town of Newcastle-upon-Tyne is in the county of Northumberland. It is in fact describing a man as of one county who resides in another.

Corrie, in support of the rule.—The objection is one of the very strictest. It is enough that certain parts of the town are in fact within the county of Northumberland: for, there is no affidavit to exclude the presumption that the defendant may be resident in the county. It is precisely the same as if the party were described as of "that part of Newcastle-upon-Tyne which is in the county of Northumberland." It is manifest that the learned judge, when he made the order, could not have had his attention called to the statute 2 & 3 Will. 4, c. 64.

TINDAL, C. J.—We should have been bound to take judicial notice that Newcastle-upon-Tyne is a town and county of itself; and, had it rested there, I should have thought the objection to the writ available. But, by the recent statute, of which we are also bound to take judicial notice, the borough of Newcastle-upon-Tyne is declared to comprise five several townships in the county of Northumberland besides the town and county of Newcastle. It is perfectly consistent with what appears here, that the defendant resides in a part of Newcastle-upon-Tyne that is in the county of Northumberland. If the fact be otherwise, it should have been made appear to the judge by affidavit.

VAUGHAN, J., concurred.

BOSANQUET, J.—I am of the same opinion. If the statute 2 & 3 Will. 4, c. 64, had been brought under the consideration of my Brother Coltman, he would have seen that there are certain townships in the county of Northumber-

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ich form part of Newcastle-upon-Tyne, and con-
y that there is no inconsistency on the face of the

INE, J.—It is not shewn in what part of Newcastle
ndant resides: and therefore, if there is any part
astle within the county of Northumberland, we
ıd to give effect to the writ, and hold the descrip-
icient.

Rule absolute.

SMITH *v.* NICOLLS.

Friday, Jan. 25th.

A plea of a judgment recovered in the Vice Admiralty Court at Sierra Leone is no bar to an action brought for the same cause in this country.

A judgment of a colonial court against a party absent from the place, and not represented by any agent upon whom the process of the court could be served, is prima facie void.

A foreign judgment cannot be set up as an estoppel, unless it appear upon the record that it is conclusive and binding between the parties in the place where it is pronounced.

was an action on the case. The declaration con-
ix counts—the first, for an unfounded charge of
rading, and seizure of the plaintiff's ship, the
Owen—the second, for maliciously arresting the
for an alleged rescue of the Admiral Owen, and
him to enter into recognizances in the sum of
to appear to the charge within six calendar months
ıt following—the third, for falsely charging the
with having feloniously received government stores
o have been feloniously stolen, the plaintiff know-
same to have been so stolen, and causing him to
isoned for a long time—the fourth, for falsely
the plaintiff with having received goods knowing
have been stolen, and causing his house and pre-
be entered and searched for them—the fifth, for
ıg the plaintiff's goods with due care—the sixth,
r chattels.

fendant pleaded—first, not guilty,—secondly, the
f limitations—thirdly, to the fifth count, that the
ıt had not the sale or disposal of the goods—
to the last count, that the goods were not the
the plaintiff.

plea, as to the last count so far as the same relates

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to parcel of the goods, chattels, moneys, and effects therein mentioned, that is to say, one ship, one boat, &c., that, before and at and during the times in the said count mentioned, he the defendant was a public officer of our lord the king, to wit, governor and superintendent of a certain island then parcel of his majesty's possessions in parts beyond the seas, called Fernando Po, and one of the justices assigned to keep the peace of our lord the king in and for the said island, the said island then being within the jurisdiction of the court of our lord the king of Vice Admiralty of and for and held within his majesty's colony of Sierra Leone; that he, the defendant, being such public officer and justice as aforesaid, and believing that a breach of the navigation laws had been committed by the plaintiff with the said ship and boat within the said jurisdiction, and that the said ship and boat, and the goods, moneys, chattels, and effects on board of the said ship, were liable to forfeiture, and that it was his duty as such public officer and justice as aforesaid to cause the said ship and boat, with the goods, moneys, chattels, and effects then on board thereof, to be conveyed to Sierra Leone aforesaid for adjudication in the said court, did, to wit, on the said 1st January, 1830, and within the said jurisdiction, cause the said ship and boat, and the goods, moneys, chattels, and effects then on board of the said ship, to be, and the same ship, boat, goods, moneys, chattels, and effects, thereupon then and there were seized by the crew of a certain ship employed and acting in his majesty's service in that behalf; and thereupon then and there caused the said ship, boat, goods, moneys, chattels, and effects to be, and the same thereupon then were conveyed to Sierra Leone aforesaid for adjudication in the said court, on the matters there to be alleged in respect of such breach of the said laws; and thereupon then caused the same ship, boat, goods, moneys, chattels, and effects to be and the same then were detained at Sierra Leone aforesaid

Fifth plea.

That defendant, Governor of Fernando Po,

believing that the ship &c. were liable to forfeiture, caused them to be seized,

and conveyed to Sierra Leone for adjudication;

that they were detained there three weeks, and then restored.

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for a certain space of time, to wit, for the space of three weeks, at the expiration whereof, to wit, on the 1st February, 1830, the said ship, boat, goods, moneys, chattels, and effects were restored to and received back by the plaintiff, he then being discharged and acquitted of the said breach of the navigation laws. And the defendant said, that, in so causing the said ship, boat, goods, moneys, chattels, and effects to be seized, conveyed, and detained as aforesaid, and not otherwise, he converted and disposed thereof in manner and form as the plaintiff had above in that behalf complained against him. And the defendant further said, that, before the commencement of the suit, to wit, on the 1st April, 1830, the plaintiff impleaded the defendant in the said court of our lord the king of Vice Admiralty, the same court then and thenceforth continually having jurisdiction in the premises, of and concerning the causing the said ship, boat, goods, moneys, chattels, and effects to be seized, conveyed, and detained as aforesaid, and for all the damages by him the plaintiff sustained on occasion thereof: and the plaintiff then claimed and sued for such damages in such plea in the said court as aforesaid: and such proceedings were thereupon had in the said court, that afterwards, and before the commencement of this suit, to wit, on the 19th April, 1830, a sentence and decree were made and pronounced in and by the said court in the said plea, and in and upon the matters of the said claim and suit; by which same sentence and decree it was ordered and adjudged that the defendant should pay to the plaintiff the damages by the plaintiff sustained on occasion of the premises, with costs and expenses, the amount of such costs, damages, and expenses to be ascertained and reported to the said court by the registrar thereof; and thereupon, afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, the registrar of the said court, to wit, one John Bruno did ascertain and report to the said court that such costs, damages, and expenses amounted to a certain sum

That plaintiff impleaded defendant in the Vice Admiralty court,

and obtained a decree against her for 450*l.* 5*s.*,

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of money, to wit, the sum of 451*l.* 5*s.*, and which report was afterwards, and before the commencement of this suit, to wit, on the day and year last aforesaid, read and affirmed by the said court; as by the record and proceedings of the said sentence, decree, and affirmance, still remaining in the said court, more fully appears; which said sentence, decree, and affirmance have not been in any wise reversed or made void—verification.

which is still in force.

Seventh plea—

Seventh plea, to the last count—that, before and at and during the times in the same count mentioned, the defendant was a public officer of our lord the king, to wit, governor and superintendent of a certain island then parcel of his majesty's possessions in parts beyond the seas, called Fernando Po, and one of the justices assigned to keep the peace in and for the said island; that, at the said times when &c., the said moneys, chattels, goods, and effects were in and upon the said island, and that, before any of the said times when &c., to wit, on the 1st January, 1829, the plaintiff left the island, and from thenceforth continually until and during and at and after the said times when &c., remained and was absent from the said island, and that, during all the said times when &c., there was no one on the part of the plaintiff in charge of the same goods, chattels, moneys, and effects, and the same were by reason thereof in danger of being lost, stolen, decayed, deteriorated, and destroyed; whereupon the defendant, then being such public officer and justice as aforesaid, and believing that it was his duty as such public officer and justice as aforesaid as far as in him lay to protect and take care of property in the island left unprotected, and to dispose of the same in the way most consistent with the interests of the owners thereof, and that it was for the interest and would prove consistent with the wishes of the plaintiff that the said goods, chattels, moneys, and effects should be disposed of as thereinafter mentioned, and for the purpose of preventing the plaintiff from being deprived of and losing the same goods, chattels, moneys, and effects, and in order

That defendant being such governor,

and the goods &c. being upon the island, and the plaintiff absent,

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to procure for and preserve to the plaintiff all the benefit and advantage that could be derived therefrom, did, to wit, on the said 1st January, 1838, cause the same to be, and the same therefore then were, taken and collected by and into the hands of certain public officers of the said island by the defendant in that behalf directed and authorized; and thereupon the said goods, chattels, and effects then were sold and disposed of for the most money and best price and prices that could be reasonably had and gotten for the same; and the moneys in the said last count mentioned, together with the moneys arising from the said sale and disposition, after deducting certain expenses and necessary payments thereout, then amounted to a certain large sum of money, to wit, the sum of 5,000*l.*; and thereupon the defendant then caused the same sum to be and the same then was remitted to certain other persons, to wit, the lords commissioners of his majesty's treasury, for the purpose of being paid over to and received by the plaintiff in full satisfaction and discharge of the cause of action in the said last count mentioned, and all damages by the plaintiff sustained on occasion thereof. And the defendant in fact said that afterwards, and before the commencement of this suit, to wit, on the 1st January, 1836, the plaintiff accepted and received the same sum of money from the same persons in full satisfaction and discharge of the cause of action in the said last count mentioned, and all damages by him sustained on occasion thereof. And the defendant further said, that, in so causing the said goods, chattels, moneys, and effects to be collected, taken, disposed of, and dealt with as aforesaid, and not otherwise, he converted and disposed thereof, in manner and form as the plaintiff had above in that behalf complained against him.

the defendant caused them to be sold for the plaintiff's benefit,

remitting the proceeds to the lords commissioners of the treasury, for the purpose of being delivered to the plaintiff.

That the plaintiff received the money in satisfaction.

To the fifth plea, so far as the same related to part of the causes of action in the introductory part of the said fifth plea mentioned, to wit, the causes of action as to the said one ship and one boat, and the said sails, oars, ropes, anchors, and yarns, the plaintiff replied—that the defendant

Replication to part of the fifth plea—

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was not in the said colony of Sierra Leone, or at any place within the jurisdiction of the said Vice Admiralty court, [*before or* (51)] at the time of the commencement of or at any time during the proceedings in the said court in the matter of the said claim and suit in the said Vice Admiralty court in the said fifth plea mentioned, or resident therein, nor was the defendant at any time before the making or pronouncing of the said sentence and decree in the said fifth plea mentioned, or the making or affirming of the said report therein mentioned, in any manner, according to the course and practice of the said court or otherwise, monished, summoned, or cited to appear in the said court in the said matter, or in any wise notified, nor did the defendant then know of the same proceedings or any of them, so that the defendant could or might, by himself or his proctor, attorney, or other agent by him appointed and instructed in that behalf, appear or plead or in any wise defend himself in the matter of the said claim and suit in the said fifth plea mentioned, nor did the defendant appear in or to any or either of the said proceedings: whereby the said sentence and decree and affirmance were and are contrary to natural justice, and wholly inoperative and void, and all remedy thereon for the recovery of the said damages and costs and expenses for which the said sentence and decree and affirmance were made and given, was and is lost to the now plaintiff; and the now defendant had always resisted and had impeached the said sentence and decree and affirmance on that account; and the same had continued so inoperative and void, and the plaintiff had not ever obtained or been able to obtain the said damages and costs and expenses, or either of them, or any part thereof, in the said fifth plea stated to have been adjudged to him; and the said sentence, decree, and affir-

That defendant was not within the jurisdiction of the Vice Admiralty court pending the proceedings against him,

nor was he cited or monished;

whereby the sentence was contrary to natural justice, and void;

that defendant resisted and impeached the sentence on that account, and the same was inoperative, and continued unsatisfied.

(51) To cure an objection that it would not otherwise appear that the defendant was *ever* within the jurisdiction of the Vice Admiralty Court at Sierra Leone, it was agreed that these words should be struck out. In consequence of this the amendment of the replication to the seventh plea was permitted to be made *without costs*.

mance still remain so unsatisfied and without force or effect: and this the plaintiff is ready to verify; wherefore he prays judgment and his damages by him sustained on occasion of committing the said grievances as to the said one ship and one boat, and the said sails, oars, ropes, anchors, and yarns, to be adjudged to him &c. And, as to the said fifth plea so far as the same related to the residue of the said causes of action in the introductory part of the said fifth plea mentioned, and in that plea attempted to be justified, the plaintiff replied—that the residue of the said goods and chattels in the introductory part of the said fifth plea mentioned, being the goods and chattels to which the said residue of the said causes of action in the introductory part of the said fifth plea mentioned related, were not, nor were either of them, nor was any part thereof, in the said ship or boat before or at the time of the said seizure in the said fifth plea mentioned, nor were the same, nor was any part thereof, liable to seizure or forfeiture as in the said fifth plea alleged, as the defendant at the said times when &c. in the last count mentioned well knew; that no part of the said last-mentioned goods and chattels was restored to or received back by the plaintiff; and that he did not implead the defendant in the said court of our said lord the king of Vice Admiralty of or concerning the causing the last-mentioned goods and chattels, or any or either of them, or any part thereof, to be seized or converted as aforesaid, nor did the plaintiff recover, nor were there awarded or adjudged to him in or by the said sentence or decree any damages in respect thereof, as in the said fifth plea alleged —concluding to the country.

As to the residue—

That the goods were not liable to forfeiture;

that no part of them was restored; and that the plaintiff did not implead the defendant in the Vice Admiralty Court, &c.

To the last plea the plaintiff replied—that, at the said times when &c. in the last count mentioned, divers persons and servants of the plaintiff had the charge of the said goods, chattels, moneys, and effects for the plaintiff and on his behalf, and the same were not, nor was any part thereof, in danger of being lost, stolen, decayed, dete-

Replication to the last plea.

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riorated, or destroyed; and the defendant, well knowing the same, wrongfully caused the said goods and chattels, moneys and effects to be taken and seized, and sold and disposed of, otherwise than for the purpose of preventing the plaintiff from being deprived of and losing the same, or in order to procure for and preserve to the plaintiff the benefit and advantage that could be derived therefrom: that he the plaintiff did not accept or receive the said sum of 5,000*l.* in the said last plea mentioned in full satisfaction and discharge of the cause of action in the said last count mentioned and all damages by him sustained on occasion thereof—concluding to the country.

That the goods were wrongfully seized and sold;

and plaintiff did not receive the money in satisfaction.

The defendant demurred specially to the replication to the fifth plea, so far as the same plea related to the part in the introduction of the same replication mentioned of the causes of action in the introduction of the said fifth plea mentioned; assigning for causes—that the plaintiff by the said replication attempted to avoid the sentence, decree, and affirmance admittedly pronounced, made, and obtained in a court of competent jurisdiction, on his own suit and proceedings, and in his own favour, and still existing and not in any way reversed or made void, by alleging irregularities in such proceedings—that it was not competent for the plaintiff to assert in pleading the nullity of such sentence, decree, and affirmance obtained by himself as aforesaid, and which if erroneous he might have procured to be set aside; nor for the purposes of such assertion to tender an issue on the course and practice of the said court of Vice Admiralty of Sierra Leone, or on the consistency of his the plaintiff's proceedings, and the sentence, decree, and affirmance founded thereon, with the course and practice of the same court, or with natural justice—that the replication did not sufficiently shew either that the said sentence, decree, and affirmance were absolutely void, or that they were subsequently avoided—that the plaintiff had in the same replication alleged the said sentence, decree, and affirmance to

Demurrer to the first part of the replication to the fifth plea.

As to the sentence of the Vice Admiralty Court.

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be inoperative and void by reason of circumstances which did not sufficiently shew the same to be inoperative and void; and it was consistent with the allegations in the same replication that the defendant had a house and property within the jurisdiction of the said court of Vice Admiralty during all the said proceedings therein, and that the said sentence, decree, and affirmance were incidental to proceedings in rem as to the said ship, boat, goods, moneys, and chattels and effects in the said fifth plea mentioned, and that the same were duly libelled in the said court of Vice Admiralty, and that such libel was duly notified at the said ship or to the crew by whom the defendant caused the same to be seized as in the said fifth plea mentioned, or otherwise according to the course and practice of the same court, and that the said sentence, decree, and affirmance were, although no such monition, citation, or summons as in the same replication mentioned were served on the defendant, and notwithstanding the other circumstances in the same replication mentioned, consistent with the course and practice of the said court, and not contrary to natural justice— that the same replication did not sufficiently shew how or in what way the said sentence, decree, and affirmance were inoperative and void, nor how or in what way all remedy thereon for the recovery of the said damages, costs, and expenses was and is lost as alleged, nor how or in what way the defendant had as alleged resisted and impeached the said sentence, decree, and affirmance; and that, for anything that in the same replication sufficiently appeared to the contrary, the plaintiff was then seeking to enforce, or might thereafter enforce the said sentence, decree, and affirmance by action or otherwise – that the said replication was double and multifarious and uncertain, and contained irrelevant and superfluous matter, and offered and tended to immaterial issues, in this, to wit, that it alleged that the said sentence, decree, and affirmance were inoperative and void as therein mentioned, and that all remedy thereon for

Duplicity.

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the recovery of the said damages, costs, and expenses was and is lost to the plaintiff; and also that the defendant had always resisted and had impeached the same; and also that the plaintiff had never obtained or been able to obtain the said damages, costs, and expenses, or any part thereof, and that the said sentence, decree, and affirmance remained unsatisfied—and that, in the same replication as above pleaded, no single, sufficient, material, and pertinent issue could be taken or joined—and that the same replication was in other respects informal and insufficient (52).

Demurrer to the residue of the replication to the fifth plea.

The defendant also demurred specially to the replication to the fifth plea so far as the same plea related to the said residue of the said causes of action in the introductory part of the same fifth plea mentioned; assigning for causes—that

Inducement traversed.

the plaintiff had therein traversed mere matters of inducement, and taken immaterial issues, that is to say, on the allegations in the same plea that the goods and chattels in the same replication referred to were in the said ship and

(52) The points marked in the margin of this demurrer were as follow:—

"That the plaintiff is estopped from asserting against the defendant the nullity of the judgment admittedly obtained by him against the defendant.

"That the judgment, not being shewn to have been in any way reversed or made void, is a subsisting bar to an action for the same cause of action.

"That the replication does not sufficiently shew that the judgment is void, or that it has been deprived of efficacy; and that the subsistence and validity of the said judgment in law are consistent with the truth of all the matters disclosed in the replication.

"That the replication is too general, and does not sufficiently shew how, as alleged, the judgment is void, nor how, as alleged, all remedy on the judgment was lost to the plaintiff, nor how, as alleged, the defendant has impeached the judgment.

"That the replication is double and multifarious, and attempts to set up various distinct matters by way of reply, that is to say, that the judgment was and is void, that all remedy thereon has been lost, that the defendant has impeached it, and that the plaintiff has derived no benefit from it.

"That the replication contains irrelevant and superfluous matter, and that no single and sufficient issue can be taken thereon."

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boat before and at the time of the said seizure, and that the same were restored to and received back by the plaintiff—that the same replication was double and multifarious, in this, to wit, that it took issue on both the said allegations lastly hereinbefore referred to, and also alleged that the same goods and chattels were not, nor was any part of them, liable to seizure or forfeiture, and that the defendant well knew the same; and also took issue on the several allegations in the same plea as to the impleading of the defendant and the recovery by and awarding and adjudging to him the plaintiff in and by the said sentence and decree of such damages as aforesaid—that the same replication contained and raised a negative pregnant, in this, to wit, that it denied the impleading by the plaintiff of the defendant in the said court of or concerning the causing the said goods and chattels, or any or either of them, or any part thereof, to be seized or converted as aforesaid, and the recovery by the plaintiff, and the awarding and adjudging to him by the said sentence and decree of damages in respect thereof; and so left it uncertain whether the plaintiff denied that there were any such proceedings, sentence, decree, and affirmance in and of the said court of Vice Admiralty as in the same plea mentioned, or, admitting that such proceedings, sentence, decree, and affirmance were had and made in the said court between the plaintiff and the defendant, denied that they related to the same goods, chattels, and damages, and whether the issue to be tried by the country, was, the existence of such sentence, decree, and affirmance of the said court of Vice Admiralty, or the identity of the causes of action—that the same replication involved and tended to a departure in pleading, in this, to wit, that, whereas the plaintiff had above complained of the defendant in an action on the case, and for the wrongful conversion of goods which had come to his possession by finding, the plaintiff had in and by the same replication attempted to raise and offered an

Duplicity.

Negative pregnant.

Departure.

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issue on the lawfulness of the taking of the goods and chattels by the defendant, and asserted matters which if true would shew that the only cause of action was a trespass with force and arms, that is to say, the seizing by the defendant of goods and chattels which to his knowledge were not liable to seizure—that, in the same replication as above pleaded, no single, sufficient, material, pertinent, and certain issue could be taken—and that the replication was in other respects uncertain and informal (53).

Demurrer to the replication to the seventh plea.

Inducement traversed.

There was also a special demurrer to the replication to the last plea, assigning for causes—that the plaintiff had therein traversed mere matters of inducement, and taken immaterial issues, that is to say, on the allegations in the same plea that there was no one on the part of the plaintiff in charge of the said goods and chattels, moneys and effects, and that the same were in danger of being lost, stolen, decayed, deteriorated, or destroyed as therein mentioned—

Duplicity.

that the replication was double and multifarious, in this, to wit, that it not only took issue on the allegations lastly thereinbefore referred to, and alleged that divers persons and servants of the plaintiff had the charge of the said goods, chattels, moneys, and effects for the plaintiff and on his behalf, but also alleged that the defendant, well knowing the same, caused the said goods and chattels, moneys and effects to be taken and seized, and sold and disposed of, otherwise than for the purpose in the said plea mentioned, and also denied the acceptance and receipt of the said sum of 5,000*l.* in satisfaction as aforesaid; and so the same

(53) The points morked in the margin of this demurrer were as follow:—

"That the replication traverses mere matter of inducement, and takes immaterial issues.

"That it is double and multifarious.

"That it raises a negative pregnant, by denying the judgment concerning the causes of action stated, leaving it doubtful whether the judgment or the identity of the causes of action is denied, or both.

"That it departs from the count, which is in trover, by shewing the cause of action to be a trespass."

replication contained double, multifarious, superfluous, and immaterial matter, and tended to an uncertain, insufficient, doubtful, or double issue—that the replication contained and involved a departure in pleading, in this, to wit, that whereas the plaintiff had above complained of the defendant in an action on the case, and for the wrongful conversion of goods which had come to his possession by finding, the plaintiff had in and by the same replication alleged as in support of his said action matter which if true would as in the same replication pleaded be the subject of or support an action of trespass with force and arms, that is to say, that the defendant wrongfully caused the said goods, chattels, moneys, and effects, whereof as in the same replication alleged the said persons and servants of the plaintiff had the charge for the plaintiff and on his behalf, to be taken and seized, and sold and disposed of—and that the replication was in other respects informal and insufficient (54).

Departure.

The plaintiff joined in demurrer.

Henderson, in support of the demurrers.—The replication to the fifth plea is insufficient. The judgment of the Vice Admiralty court may be *voidable*, but it clearly is not *void*. The only cause of absolute nullity would be, want of jurisdiction. But it is alleged in the fifth plea, and is not denied by the replication, that the court had general jurisdiction in the premises. As to the local juridiction there is no doubt: the only question is as to the personal liability of the defendant to the jurisdiction, he not being within the jurisdiction, or served with process. Suppose an officer of the Vice Admiralty Court at Sierra Leone had made a seizure in execution of a decree of the court, would trover or trespass lie against him? In *Ladbroke* v. *Crickett*, 2 T. R. 649, it was held, that, if the owner of a ship charge her for repairs done in England by instrument under seal,

As to the replication to the fifth plea.

(54) The points marked in the margin of this demurrer were the same as those in the margin of the second demurrer, ante n. (53).

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stated to be by way of bottomry, upon which she is afterwards siezed by Admiralty process, and decreed to be sold to satisfy the demand, and no appeal is made from that sentence, but between the seizure and decree a writ of execution issues against the owner at the suit of another creditor, the sheriff cannot take the vessel under this writ, nor can he maintain trover against the officer in possession by the warrant of the court of Admiralty; and that, where the court of Admiralty have given a sentence, it shall be taken that they had jurisdiction, unless the contrary appear on the face of it. "It is immaterial," said Lord Kenyon, "to consider in this case whether the court of Admiralty had any jurisdiction or not. If the proceedings in the court of Admiralty be erroneous, they are to be rectified on appeal." So, here, if the judgment was improperly obtained, the plaintiff might have applied for a reversal of it. A judgment of outlawry is good until set aside, though it may have been obtained whilst the defendant was abroad. This plaintiff at all events is estopped from objecting that the judgment which he himself obtained is null. The question in effect is a question as to the course and practice of the Vice Admiralty court; which it is not competent to this court to inquire into it. In *Tarleton* v. *Tarleton*, 4 M. & S. 20, which was an action upon a covenant to indemnify the plaintiff from all debts due from the late partnership of the plaintiff, defendant, and D. B., and from all suits &c., proof, on a copy of the proceedings in the court of Chancery of the island of Grenada, in a suit there instituted against the late partners for the recovery of a partnership debt, in which a decree passed against them for want of answer, per quod a sequestration issued against the plaintiff's estate, and he was obliged to pay the debt &c.—was held to be conclusive against the defendant, and that the defendant was not at liberty to shew that the procoedings were erroneous. "I thought," said Lord Ellenborough, "that I did not sit at

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Nisi Prius to try a writ of error in this case upon the proceedings in the court abroad." In *Becquet* v. *MacCarthy*, 2 B. & Ad. 951, it was held, that, to render a foreign judgment void, on the ground that it is contrary to the law of the country where it was given, it must be shewn clearly and unequivocally to be so. There, the law of a British colony (Mauritius) required that in a suit instituted against an absent party the process should be served upon the king's Attorney-General in the colony; but it was not expressly provided that the Attorney-General should communicate with the absent party: and it was held that such law was not so contrary to natural justice as to render void a judgment obtained against a party who had resided within the jurisdiction of the court at the time when the cause of action accrued, but had withdrawn himself before the proceedings were commenced. So, in *Martin* v. *Nicolls*, 3 Sim. 458, it was held that a foreign judgment cannot be questioned in the court of Chancery of this country. The courts of this country have always evinced an anxious desire to accredit the judgments of foreign courts: where they have a general jurisdiction over the subject-matter, the temporary absence of the party will not deprive them of it. *Le Caux* v. *Eden*, Doug. 594, decided that the court of Admiralty has *exclusive* jurisdiction in all questions relating to prize. In *Burrows* v. *Jemino*, 2 Str. 733, it was held that a party cannot be sued here on his acceptance of a bill of exchange abroad after he has been discharged by the laws of the country where the acceptance was made. And in *Douglas* v. *Forrest*, 1 M. & P. 663, 4 Bing. 686, assumpsit was held to be maintainable in the courts at Westminster on a Scotch decree obtained in absence against a native of Scotland, for a debt contracted there. The replication is also bad for duplicity: it alleges as one ground of objection, that the judgment of the Vice Admiralty Court is void, and for another, that the defendant, having impeached, is estopped from re-asserting it.

Duplicity.

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The second branch of the replication to the fifth plea is also bad, either as traversing that which is mere matter of inducement, or for duplicity. The denial of the judgment is pregnant with the denial of the identity of the causes of action: the plaintiff had no right to traverse both.

As to the replication to the seventh plea.

The replication to the seventh plea is also bad for duplicity: it traverses that which is alleged in the plea as matter of inducement. It also involves a departure, shewing the cause of action to be a *trespass*.

Objections to the fifth plea.

W. H. Watson, contrà.—The fifth plea is open to two objections—first, that a plea of a judgment recovered by the plaintiff in a colonial court is not a bar to an action brought for the same cause in the courts of this country—secondly, assuming that it is so, it must be shewn in pleading that it is binding and final and conclusive between the parties, and would operate as a bar to an action brought in the colony.

1. There is no authority to be found in which a mere judgment of a foreign court, not satisfied by execution, has been held to be a bar to an action here. There is no analogy whatever between a foreign judgment and a judgment of one of the superior courts at Westminster. The latter is binding and conclusive between the parties, both as regards the merits and the jurisdiction; and can only be called in question upon writ of error: it is final and conclusive as an estoppel; and in the administration of assets ranks before simple contract debts and specialties. But the judgment of a colonial court is not conclusive; the defendant may shew that he was not resident within the jurisdiction, or that he was not summoned—*Buchanan* v. *Rucker*, 1 Camp. 63, 9 East, 192; *Cavan* v. *Stewart*, 1 Starkie, 525; *Walker* v. *Witter*, Doug. 1; and the merits may be questioned in the courts of this country—1 Phil. Evid. 537. In *Hall* v. *Obder*, 11 East, 118, Lord Ellenborough says: "Strictly speaking, judgments in foreign courts are

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not to be considered upon the same footing as judgments in our own courts of record; they are but evidence of the debt; they do not bar or stay an action on simple contract; but assumpsit lies on them, and it is open to the parties to enter into the question of their regularity." Le Blanc, J., says: "It was long ago determined that a judgment in a foreign court has only the force of a simple contract between the parties: it is evidence of the debt." And Bayley, J.— "This being only a foreign judgment, did not extinguish or merge the plaintiff's simple contract debt, which can only be done by converting it into a debt of a higher nature: it is only evidence of the debt." A judgment of a foreign court ranks with debts upon simple contract; it amounts to no more than an agreement as to the quantum of damages. It is accord without satisfaction. In *Plummer* v. *Woodburne*, 7 D. & R. 25, 4 B. & C. 625, it was held that a judgment obtained by the defendant in a colonial court cannot be pleaded by way of estoppel to a declaration in this country for the same cause of action, unless it is shewn that the judgment so obtained would be final and conclusive in the colonies. The case of *Burrows* v. *Jemino* stands upon a very different foundation: that was a proceeding in rem; and the court at Leghorn had vacated the acceptance itself.

2. If this judgment be a bar, the plea should have alleged it to be binding and conclusive between the parties. This court cannot take judicial notice of the proceedings of the Vice Admiralty Court at Sierra Leone: and, if the judgment be not final and conclusive there, it cannot be so here.

As to the seventh plea.

The seventh plea is clearly bad: it alleges satisfaction without accord. *Grymes* v. *Blofield*, Cro. Eliz. 541; *Peytoe's* Case, 9 Rep. 77. b., 1 Brownl. 133, 2 Brown. 128, Godb. 149. [*Tindal*, C. J.—That is cured by pleading over.]

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As to the replication to the seventh plea.

The replication to the seventh plea (55) is sufficient. It is competent to a plaintiff, in the case of a wrongful taking of goods, to waive the tort and sue in trover—*Branscomb* v. *Brydges*, 1 B. & C. 145, 2 D. & R. 256. [*Tindal*, C. J.—The answer to that objection is, that that which is a departure in pleading, would upon the evidence lead to a nonsuit.] The material and substantial issue tendered by the replication, is, that the plaintiff did not accept or receive the 5,000*l.* in full satisfaction and discharge of the cause of action, and all damages sustained on occasion thereof. The prefatory averment is altogether immaterial. [*Tindal*, C. J.—It leads to an idle and unnecessary expense to take up every immaterial allegation in the plea.] At the most, that the introduction of which is complained of is mere surplusage: and "surplusage shall never make the plea vicious, but where it is contrarient to the matter before"—Co. Litt. 303. b.; Stephen on Pleading, 3rd edit. 378.—Utile per inutile non vitiatur. If the defendant had simply pleaded accord and satisfaction, the whole might have gone to the jury.

[*The Court*, conceiving the replication to the seventh plea to be obnoxious to the charge of duplicity, suggested to *Watson* the propriety of amending: this being assented to]—

Reply.

Henderson, in reply, was called on to support his fifth plea.—The judgment of the court at Sierra Leone, which is averred to be a court of record, is conclusive—1 Starkie on Evidence, 228. A judgment of one of the courts at Westminster is an absolute bar only if pleaded. [*Bosanquet*, J.—Whether the foreign judgment is conclusive as to the amount of damages, is a very different question from whether it operates as a bar to an action in this country

(55) Watson was desired to confine his argument to the replication to the seventh plea; the court intimating an opinion that the fifth plea was ill.

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for the same cause.] This judgment is at least equipollent with an award: can it be said that it has not put an end to the original cause of action? By the plaintiff's own act, his demand has changed its form, and is become capable of being enforced by a different species of action. The rights of the parties are changed. In *Arnott* v. *Redfern*, 11 Moore, 209, 3 Bing. 353, it was held that a foreign judgment is primâ facie evidence of a debt, and that every thing was done in the court in which it was obtained that was necessary to support it. The plaintiff at least is estopped from raising this objection. It is undoubtedly true as a general proposition that estoppels must be mutual: but there is a species of estoppel which is not subject to this strict rule: a man cannot be permitted to aver that he has obtained a judgment by fraud—*Prudham* v. *Phillips*, Ambler, 763. In *Buchanan* v. *Rucker*, 1 Camp. 63, and *Cavan* v. *Stewart*, 1 Stark. 525, the respective defendants had never been within the jurisdiction of the colonial courts. And, with respect to *Plummer* v. *Woodburne*, it is consistent with what appeared there that the judgment relied on was a judgment of nonsuit (56).

The objection that it should have been shewn upon the plea that this judgment was binding and conclusive between the parties, is cured by pleading over.

As to the fifth plea.

TINDAL, C. J.—It appears to me that this fifth plea is substantially bad. This is an action of trover to recover damages for the wrongful seizure and conversion of a certain ship and boat and certain goods belonging to the

(56) See Obicini v. Bligh, 1 M. Scott, 477, 8 Bing. 335, where it is held that an action will not lie in the courts at Westminster upon a judgment of a foreign court, unless it clearly appear by the transcript of the proceedings that the defendant was subject to the jurisdiction of the foreign court, and that the judgment pronounced against him was final, and for a definite sum. And see Novelli v. Rossi, 2 B. & Ad. 757; and Burge on Colonial Law, 1062, 3.

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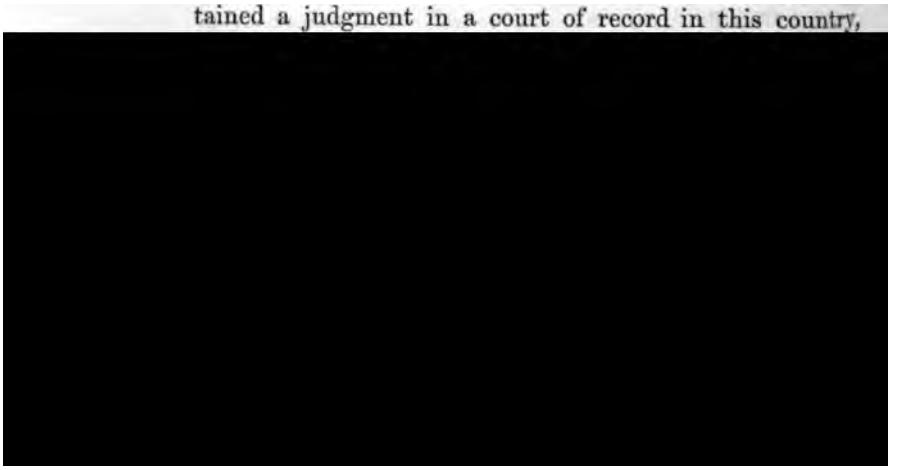
plaintiff. The answer set up by the fifth plea in substance is, that the plaintiff impleaded the defendant in the Vice Admiralty Court at Sierra Leone, and obtained a sentence or decree in that court for damages and costs to be ascertained and reported by the registrar of the court; that such damages and costs were afterwards ascertained and reported to amount to 451*l.* 5*s.*; that the report was affirmed; and that the sentence, decree, and affirmance had not in anywise been reversed or made void. The broad question, therefore, is, whether this is a plea of judgment recovered so as to deprive the plaintiff of the right of suing here upon his original cause of action, or whether it amounts to more than an agreement as to the quantum of damages. No case has been cited on the part of the defendant, and indeed it is admitted that none can be found, to shew that a judgment of this sort stands upon the same footing as a judgment recovered in one of the superior courts at Westminster. The ground upon which a judgment recovered in our courts is held to be a bar, is, that the nature of the debt or demand is changed: the plaintiff has a higher remedy; he has a judgment of a court of record upon which an immediate execution may be issued: consequently, it would be very superfluous, and give encouragement to much useless litigation, and create great unnecessary delay and expense, if he might commence de novo and bring a second action for the same debt or ground of complaint. It has, therefore, always been held, that, where a plaintiff has obtained a judgment in a court of record in this country,



ing upon such a judgment in this country, is, by bringing an action upon it, in which action the judgment of the colonial court forms the evidence. The first ground of distinction therefore between such a judgment and a judgment in a court of record in this country is, that, upon the latter there is an immediate remedy by execution, whereas the former can only be enforced by having recourse to another action. Considerable doubt formerly existed (and some doubt still exists) as to whether a judgment recovered in a foreign court is conclusive between the parties, or subject to be re-agitated in the courts of this country. The matter underwent very grave discussion in *Phillips* v. *Hunter*, 2 H. Blac. 402. Lord Chief Justice Eyre there says: "It is in one way only that the sentence or judgment of the court of a foreign state is examinable in our courts, and that is, when the party who claims the benefit of it applies to our courts to enforce it. When it is thus voluntarily submitted to our jurisdiction, we treat it, not as obligatory to the extent to which it would be obligatory perhaps in the country in which it was pronounced, nor as obligatory to the extent to which by our law sentences and judgments are obligatory, not as conclusive, but as matter in pais, as consideration primâ facie sufficient to raise a promise: we examine it, as we do all other considerations of promises, and for that purpose we receive evidence of what the law of the foreign state is, and whether the judgment is warranted by that law. In all other cases, we give entire faith and credit to the sentences of foreign courts, and consider them as conclusive upon us." If the judgment has not altered the nature of the rights between the parties, why is the plaintiff to be deprived of the right which every subject of her majesty has to sue in the courts of this country for the debt due to or damage sustained by him? It appears to me that he has the option of suing upon his original ground of action, or bringing an action of assumpsit upon the foreign judgment. Such seems to have been the opinion

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of the court in *Hall* v. *Odber*, 11 East, 124, where Bayley, J., says: "This being only a foreign judgment, did not merge or extinguish the plaintiff's simple contract debt, which can only be done by converting it into a debt of a higher nature: it is only evidence of the debt." There, evidence of an account stated, whereby the defendant admitted a certain balance to be due to the plaintiff, was held to be confirmed by evidence of a foreign judgment recovered by the plaintiff for the same sum. This is wholly inconsistent with the doctrine contended for on the part of the defendant in this case.

Replication to the fifth plea shews primâ facie that the judgment is void.

The replication discloses matters which shew primâ facie that this judgment is a void judgment. It states "that the defendant was not in the said colony of Sierra Leone, or at any place within the jurisdiction of the said Vice Admiralty Court, at the time of the commencement of or at any time during the proceedings in the said court in the matter of the said claim and suit in the said Vice Admiralty Court in the said fifth plea mentioned, or resident therein; nor was the defendant at any time before the making or pronouncing of the said sentence and decree in the said fifth plea mentioned, or the making or affirming of the said report therein mentioned, in any manner, according to the course and practice of the said court, or otherwise, monished, summoned, or cited to appear in the said court in the said matter, or in anywise notified, nor did the defendant then know of the same proceedings or any of them, so that he could or might, by himself or his proctor, attorney, or other agent by him appointed and instructed in that behalf, appear or plead, or in anywise defend himself in the matter of the said claim and suit in the said fifth plea mentioned; nor did the defendant appear in or to any or either of the said proceedings: whereby the said sentence and decree and affirmance were and are contrary to natural justice, and wholly inoperative and void." Until that is answered by shewing some law in the colony where the judgment

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was obtained, making it an available judgment notwithstanding these apparent defects, I think we are bound to hold the judgment void. See the condition the plaintiff would be in if ousted of the remedy he has pursued in this case. Had the action been founded upon the judgment of the Vice Admiralty Court, the defendant would have insisted that the judgment was void. *Plummer* v. *Woodburne*, 4 B. & C. 625, 7 D. & R. 25, is an authority to shew that a judgment obtained by the defendant in the colonial courts cannot be pleaded by way of estoppel to a declaration in this country for the same cause of action, unless it is shewn that the judgment so obtained would be final and conclusive in the colonies. That does not appear upon this plea, and therefore I think the plea bad.

Judgment of colonial court no bar.

VAUGHAN, J.—I am of the same opinion. The question is whether or not the judgment is shewn to be final and conclusive in the place where it was pronounced. *Hall* v. *Odber* and *Plummer* v. *Woodburne* are decisive authorities upon the point. In the former of these cases, Lord Ellenborough says: "Strictly speaking, judgments in foreign courts are not to be considered upon the same footing as judgments in our own courts of record; they are but evidence of the debt; they do not bar or stay an action on simple contract; but assumpsit lies on them, and it is open to the parties to enter into the question of their regularity." And the same doctrine is echoed by the rest of the court. The circumstance that assumpsit lies upon a foreign judgment, goes far to shew that the propriety and regularity of it may be questioned here.

Judgment no bar.

BOSANQUET, J.—I am of the same opinion. The judgment of the Vice Admiralty Court at Sierra Leone is pleaded as a bar, on the ground that the nature of the cause of action is changed—transit in rem judicatam. It appears that the Vice Admiralty Court is not a court of

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record: it is not so averred to be on the face of the record: for, we cannot take the conclusion of the plea to amount to an averment that it is a court of record; more particularly when we know the contrary to be the fact. But it is contended on the part of the defendant, that, whether the court be a court of record or not, the nature of the cause of action is changed. It is admitted that assumpsit lies in our courts upon a judgment obtained in a foreign or colonial court: that assumes that it amounts to no more than an agreement between the parties, and does not constitute a debt of a higher nature. Such a judgment in an action of tort merely ascertains the quantum of damages; but the cause of action remains unchanged. This was the opinion of the court in *Hall* v. *Odber*, 11 East, 118. Though the judgment may amount to an accord, it is no satisfaction; and therefore no bar.—It appears from the replication that the defendant was out of the jurisdiction of the Vice Admiralty Court during the whole time the proceedings were going on against him there; and there is nothing upon this record, as in *Becquet* v. *Mac Carthy*, 2 B. & Ad. 951, to shew that a law making a judgment so obtained binding upon the party, is not so contrary to natural justice as to render the judgment void. The plea being bad, it is unnecessary to resort to the replication.

As to the replication.

Judgment no bar.

ERSKINE, J.—Taking the distinction suggested by Eyre, C. J., in *Phillips* v. *Hunter*, 2 H. Bl. 410—that, where the aid of our courts is sought to enforce the judgment of a foreign court, such judgment is only matter in pais, or a consideration primâ facie sufficient to raise a promise; but that otherwise it is conclusive—and giving the defendant in this case the full benefit of that distinction; I am of opinion that this plea is no bar: it amounts to no more than an agreement as to the quantum of damages. I also agree with the rest of the court upon the other point. It is not sufficiently shewn by the plea that the judgment in

question would be binding and conclusive upon the defendant in the colony itself: this therefore would be an insuperable objection (57).

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Judgment for the plaintiff on the fifth plea; the replication to the seventh plea to be amended.

(57) The record of a court of competent jurisdiction imports incontrovertible verity as to all the proceedings which it sets forth as having taken place; an averment to the contrary cannot therefore be made in pleading. Ramsbottom v. Buckhurst, 2 M. & S. 567.

BUCKNALL *v.* BOYDELL and Another.

Saturday, Jan. 26th.

The Master having on taxation disallowed half the costs of preparing briefs, on the ground that the plaintiff's attorney had prepared them with unnecessary haste—The court declined to interfere.

IN a country cause, where issue was joined in Hilary Term, notice of trial given on the 12th February, and the cause settled on the 16th, the Master disallowed on taxation of the plaintiff's costs one half of the charge for the briefs, conceiving that they had been prepared with unnecessary haste, for the mere purpose of making costs, the commission day not being till the 6th March.

F. V. Lee moved that the Master might be directed to review his taxation.

TINDAL, C. J.—It seems to me that this is very much a matter for the Master's discretion: and I cannot under the circumstances say that he has done wrong in allowing only half the charge for preparing the briefs.

The rest of the Court concurring—

Rule refused.

153.

Saturday, 4th July.

A. has not any right, title, or interest in the goods, &c. mentioned in the plaintiff's declaration, or any of them, on account of the plaintiff having or claiming any property, right, title, or interest in the goods, &c. or any of them.

Doe d. Tyler and Wilkinson, Lessees

Rule to shew cause why judgment signed upon an affidavit of merits should not be set aside, and why defendant should not be permitted to plead the general issue, and the statute of limitations.

Bompas moved accordingly, and that the affidavit might have been intituled "Doe on the several demises of Tyler and Wilkinson v. Roe."

Per Curiam.—The affidavit is properly intituled, and the rule must be discharged.

Rule discharged.

Doe on the Lessee of Spencer v. Wells and Bloss.

Saturday, 4th July.

In trespass for a false imprisonment of the plaintiff on a charge of having committed a certain offence, to wit, a felony.—The court allowed the defendant to plead 1. That the plaintiff had forged the acceptance to a certain bill of exchange. 2. That he had issued the bill, knowing the acceptance to be forged. 3. That the defendant had reasonable cause to believe that the plaintiff had forged the acceptance. 4. That the plaintiff had obtained money on the bill by false pretences.

COVERT v. ALMOND.

THIS was an action of trespass for falsely imprisoning the plaintiff on a charge of having committed a certain offence, to wit, a felony.

Jervis, on a former day in this term, on the part of the defendant, obtained a rule nisi to withdraw his plea, and substitute pleas to the following effect:—1. That the plaintiff had forged the acceptance to a certain bill of exchange. 2. That he had issued the bill, knowing the acceptance to be forged. 3. That the defendant had reasonable cause to believe that the plaintiff had forged the acceptance. 4. That the plaintiff had obtained money on the bill by false pretences.

Henderson, contrà.—The proposed pleas are unreasonable and unnecessary, and contrary both to the letter and the spirit of the new rules. The ground of defence is substantially the same in the first three pleas—either that the plaintiff had been guilty of a felony, or that the defendant had reasonable ground for suspecting him. [C. J.—It

might be doubtful whether the offence amounted to an uttering, or merely obtaining money under false pretences: the two offences run very close together.] The declaration charges a detention for a felony; and the fourth plea seeks to justify under a suspicion that the plaintiff had been guilty of a misdemeanor: the court will not aid the defendant in putting upon the record a demurrable plea.

Jervis and *Roberts*, in support of the rule, were stopped by the court.

TINDAL, C. J.—I am of opinion that the present case does not fall within the new rules. A defendant cannot, it is true, be permitted to place upon the record pleas varying the statement of the facts relied on as a defence to the action: but, where the several facts and circumstances lead to different conclusions in point of law, it is to the advantage of the plaintiff that they should be put upon the record in different pleas. With regard to the first three pleas proposed to be pleaded in this case, it seems to me that we should be in effect repealing the statute of Anne if we were to disallow them. The validity of the fourth plea may be doubtful: but we will not discuss that upon a motion of this sort.

VAUGHAN, J.—On the present declaration, it would be competent to the plaintiff to prove an imprisonment either on a charge of felony or for a misdemeanor. I am of opinion that all the pleas ought to be allowed.

BOSANQUET, J.—The first three pleas set up entirely different grounds of defence; and I think that in allowing them all we shall do nothing that is inconsistent with the new rules. As to the fourth plea, I will not give any opinion as to whether it be good or not.

ERSKINE, J., concurred.

Rule absolute.

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Saturday, Jan. 26th.

In re ANN SHIRLEY.

Under the statute 3 & 4 Will. 4, c. 74, s. 91, the court may dispense with the concurrence of the husband to the conveyance by a feme covert of *copyhold* property to which she is entitled for her sole and separate use—that clause overriding the 77th.

BY the 77th section of the 3 & 4 Will. 4, c. 74, it is enacted that "it shall be lawful for every married woman, in every case, except that of being tenant in tail, for which provision is already made by this act, by deed to dispose of lands of any tenure, and money subject to be invested in the purchase of lands, and also to dispose of, release, surrender, or extinguish any estate which she alone, or she and her husband in her right, may have in any lands of any tenure, or in any such money as aforesaid; and also to release or extinguish any power which may be vested in or limited or reserved to her in regard to any lands of any tenure, or any such money as aforesaid; or in regard to any estate in any lands of any tenure, or in any such money as aforesaid, as fully and effectually as she could do if she were a feme sole; save and except that no such disposition, release, surrender, or extinguishment shall be valid and effectual, unless the husband concur in the deed by which the same shall be effected, nor unless the deed be acknowledged by her as hereinafter directed: Provided always that this act shall not extend to lands held by copy of court roll of or to which a married woman, or she and her husband in her right, may be seised or entitled for an estate at law, in any case in which any of the objects to be effected by this clause could, before the passing of this act, have been effected by her, in concurrence with her husband, by surrender into the hands of the lord of the manor of which the lands may be parcel."

And by section 91, it is provided, "that, if a husband shall, in consequence of being a lunatic, idiot, or of unsound mind, and whether he shall have been found such by inquisition or not, or shall from any other cause be incapable of executing a deed or of making a surrender of lands held by copy of court roll, or if his residence shall

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In re ANN SHIRLEY.

not be known, or he shall be in prison, or shall be living apart from his wife, either by mutual consent or by sentence of divorce, or in consequence of his being transported beyond the seas, or from any other cause whatsoever, it shall be lawful for the court of Common Pleas at Westminster, by an order to be made in a summary way upon the application of the wife, and upon such evidence as to the said court shall seem meet, to dispense with the concurrence of the husband in *any case* in which his concurrence is required by this act or otherwise; and all acts, deeds, or surrenders to be done, executed, or made by the wife in pursuance of such order, in regard to *lands of any tenure*, or in regard to money subject to be invested in the purchase of lands, shall be done, executed, or made by her in the same manner as if she were a feme sole, and, when done, executed, or made by her, shall (but without prejudice to the rights of the husband as then existing independently of this act) be as good and valid as they would have been if the husband had concurred."

Whateley moved, on behalf of Mrs. Ann Shirley, that the concurrence by her husband to the conveyance by her of certain copyhold property, which had been devised to her for her sole and separate use by her father, who died in 1826, might be dispensed with. It appeared that the husband had since 1817 been living abroad with another woman. The difficulty was, that, the husband being abroad under such circumstances, the parties could not go before the steward of the manor for the purpose of a surrender.

TINDAL, C. J.—The only difficulty seems to arise from the 77th section, which excludes copyholds. But I think that is over-ridden by the 91st, and that, in order to give full effect to the act, we must take the two clauses together.

The rest of the Court concurred.

Fiat.

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Monday, Jan. 28th.

NORCUTT, Assignee of TORR, an Insolvent Debtor, *v.* MOTTRAM.

A declaration in trover by the assignee of an insolvent debtor, charging a conversion in the time of the assignee, was allowed to be amended at the trial by alleging a conversion before the insolvency —the real question to be tried not being thereby varied.

THIS was an action of trover by the plaintiff as assignee of one Torr, an insolvent debtor. The count alleged that the plaintiff was possessed of the goods in question as assignee, and a conversion by the defendant *after* the insolvency. Pleas—not guilty, and that the plaintiff was not possessed modo et formâ.

The cause standing first in the paper for the 5th December, the plaintiff took out a summons before the Lord Chief Justice at a quarter before nine the evening before, for leave to amend the declaration by stating that Torr, the insolvent, had been possessed of the goods, and a conversion by the defendant *before* the insolvency of Torr. The goods, it appeared, were taken in November, 1837, under an execution issued upon a warrant of attorney; and the arrest and imprisonment of Torr did not take place until the month of May following. His lordship ordered the amendment to be made, leaving it to the defendant's option to amend his pleas instanter, or to make the cause a remanet, no costs to be paid on either side.

Erle, on a former day in this term, obtained a rule nisi to amend this order, by giving the defendant the costs of the day and of the amendment, and leave to plead de novo.

Wilde, Serjeant, and *Miller*, now shewed cause.—The real question between the parties was, whether or not the warrant of attorney was fraudulent in point of law. Finding that the seizure and sale took place before Torr took the benefit of the insolvent act, and therefore that the declaration was not adapted to the case, the summons to amend was taken out. The proposed amendment could not in the slightest degree vary the evidence to be given:

in either case the plaintiff must shew that the warrant of attorney was fraudulent. The defendant should have pleaded instanter, and the cause might have proceeded. There is therefore no pretence for calling upon the plaintiff to pay costs. The latter part of the rule (for leave to plead de novo) is unnecessary. By the rule of Easter Term, 1 Will. 4, s. 2, the defendant is entitled to two days' time to plead after an amendment: and there is nothing in the Lord Chief Justice's order to control that rule (58).

Erle, in support of his rule.—The issue the parties went down to try, was, whether or not the defendant had converted the goods of the plaintiff. The amended declaration substituted an entirely new case; substantially different pleas would be necessary to meet it: and it is difficult to suggest any replication that might not be open to serious objection upon special demurrer. As between Torr and the defendant, the judgment is perfectly good; and the seizure was lawful at the time it was made. [*Bosanquet*, J.—The evidence the defendant was prepared with must have been equally applicable to the amended record: the necessity for the amendment must have been foreseen.] It is impossible even now to foresee what will be the issue to be tried: it is quite as likely to be an issue of law as

(58) By the rule Easter Term, 1 Will. 4, s. 2, (C. P.), it is ordered, "that, in future, where any amendment in the declaration shall be made after a rule to plead shall have been entered, no new rule to plead shall be necessary, provided such amendment be made in the term or vacation succeeding the term in or of which the rule to plead shall have been entered; and the defendant shall have two days, exclusive of the day on which the amendment shall be actually made, to alter his plea, or plead de novo, unless otherwise ordered by the court or the judge granting leave for the amendment."

And by a subsequent rule of all the courts, Hilary Term, 2 Will. 4, s. 42, it is provided, that, "where an amendment of the declaration is allowed, no new rule to plead shall be deemed necessary, whether such amendment be made of the same term as the declaration, or of a different term."

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NORCUTT v. MOTTRAM.

one of fact. Such an amendment as this—altering the whole character of the record—has never yet been allowed. The defendant should at all events be indemnified against the costs.

TINDAL, C. J.—It being alleged, and not denied, that the real question to be tried, was, whether the warrant of attorney under which the seizure took place was fraudulent or not, I thought the amendment ought to be allowed, conceiving that the variance would be ground of nonsuit, and nothing more. The defendant must of course have leave to plead de novo: and, if dissatisfied with the manner in which the costs now stand, the defendant may have the costs of the amendment, and let the costs of the day be costs in the cause.

Erle elected to take two days' time to plead, leaving the costs as settled by the Chief Justice's order.

Rule accordingly.

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The rule is settled, that, in a country cause, where issue is joined in a *non-issuable* term, the defendant may move for judgment as in case of a nonsuit, for not proceeding to trial, in the term after the next Assizes: but that, where issue is joined in an *issuable* term, he cannot move until *two* Assizes have elapsed.

WILLIAMS *v.* DAVIS.

THIS was a country cause. Issue was joined in Trinity Term last, but no notice of trial was given.

Barstow, on a former day in this term, obtained a rule nisi for judgment as in case of a nonsuit.

Clarkson now shewed cause.—The motion is premature. The rule established by the late cases, is, that, where issue is joined in a country cause in an issuable term, judgment as in case of a nonsuit cannot be moved for until after default has been made at *two Assizes;* consequently, this motion should have been deferred till next Easter Term. In *Robinson* v. *Taylor*, 5 Dowl. 518, issue was joined in

Easter vacation: and Littledale, J., says: "The plaintiff was only bound to take one step in a term; and, admitting that the issue being joined in Easter vacation was the same thing as if it had been joined in Easter Term, he had Trinity Term to enter the issue on record, and then he had Michaelmas Term in which to give notice of trial: for, though the rule of Hilary Term, 2 Will. 4, says that no entry of the issue shall be deemed necessary to entitle the defendant to move for judgment as in case of a nonsuit; yet, in *Williams* v. *Edwards*, 3 Dowl. 183, Baron Parke says this rule is not to vary the time of moving for judgment as in case of a nonsuit." The rule is most clearly and precisely laid down by Parke, B., in *Evans* v. *Barnard*, 6 Dowl. 368—"If issue be joined in the term next before the Assizes, then two Assizes must elapse before the motion can be made; so that, if issue be joined in Trinity Term, the defendant cannot move until the following Easter Term." And Lord Abinger there says: "If issue be joined in an issuable term, the rule as to two Assizes will apply, but not otherwise." In *Apperley* v. *Morse*, 6 Dowl. 505, and also in *Harrison* v. *Williams*, 6 Dowl. 772, issue was joined in a non-issuable term; and therefore those cases are not inconsistent with *Evans* v. *Barnard*.

Barstow, in support of his rule.—The cause being ripe for trial, the plaintiff has been guilty of a default in not proceeding to try at the last Assizes. [*Vaughan*, J.—The plaintiff is not bound to give notice of trial in the same term in which issue is joined.] There are cases either way. Formerly, a rule to enter the issue was required, which took a term. It is conceded to me, that, if issue had been joined in last Easter Term, this motion might have been made in Michaelmas Term. In either case there would be a default and the lapse of two terms.

TINDAL, C. J.—The books of practice seem to me to lay

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down a very clear and intelligible rule upon this subject, viz. that, where issue is joined in a *non-issuable* term, a default at *one* Assizes will entitle the defendant to move for judgment as in case of a nonsuit; but that, where issue is joined in an *issuable* term, inasmuch as the plaintiff is not bound to give notice of trial in the same term in which the issue is joined, *two* Assizes must pass before he can be said to be in default. It is a difficult and an unprofitable task to resolve points of practice into anything like principle. The cases last referred to—*Apperley* v. *Morse* and *Harrison* v. *Williams*, as far as they go, seem to confirm *Evans* v. *Barnard*. I think this rule has been prematurely moved for, and consequently it must be discharged: let the costs be costs in the cause.

VAUGHAN, J.—I concur with my Lord Chief Justice in thinking that the defendant has come too soon. It is better to adhere to the statute—14 Geo. 2, c. 17—which enacts, that, "where any issue is or shall be joined in any action or suit at law in any of his majesty's courts of record at Westminster, &c., and the plaintiff or plaintiffs in any such action or suit hath or have neglected or shall neglect to bring such issue on to be tried *according to the course and practice of the said courts respectively*, it shall and may be lawful for the judge or judges of the said courts respectively, at any time after such neglect, upon motion made in open court (due notice having been given thereof (59)), to give the like judgment for the defendant or defendants in every such action or suit, as in cases of nonsuit." To

(59) In the King's Bench, the rule to shew cause was formerly considered a sufficient notice of itself — Anonymous, Lofft, 265; though it was otherwise in the Common Pleas—Gooch v. Pearson, 1 H. Bl. 527; Chessell v. Parkin, 2 Taunt. 48: and now, by a general rule of all the courts—Reg. Hilary, 2 Will. 4, I. 68—"a rule nisi for judgment as in case of a nonsuit may be obtained on motion, without previous notice; but in that case it shall not operate as a stay of proceedings."

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entitle the defendant to move, the plaintiff must have made default. Now, according to my experience, a plaintiff is not bound to take more than one step in a term. That being so, the plaintiff in this case cannot have been guilty of a default.

BOSANQUET, J.—The reported cases are evidence of the practice of the court; and they appear to me to have satisfactorily settled the point.

ERSKINE, J., concurring—

Rule discharged accordingly (60).

(60) See Tidd's Practice, 9th edit., 764, 765.

WATERS *v.* THE EARL OF THANET.

Monday, Jan. 28th.

A plea to an action by a second indorsee against the maker of a bill of exchange, that the defendant did not indorse the bill to the first indorsee (naming him), is a sufficient pursuance of an order permitting him to plead that he did not indorse the bill modo et formâ.

THIS was an action of assumpsit. The first count was upon a bill of exchange drawn by the defendant, and by him indorsed to one Cabe, and by Cabe to the plaintiff; the second, upon another bill between the same parties for a different amount, and indorsed in the same way: both bills were dated in 1802. The third count was upon a special agreement, reciting that the plaintiff was the owner of the two bills, that the defendant was unable to pay them, whereby the defendant, in consideration of the plaintiff's forbearing to sue him upon the bills, undertook not to avail himself of the statute of limitations. The fourth count was for interest; and the fifth upon an account stated.

The defendant pleaded, to the whole declaration, that he did not undertake and promise modo et formâ, and the statute of limitations; and, to all but the third count, the statute of limitations. An application was made to Coltman, J., to strike out the first and last pleas, on the ground

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that non assumpsit was not pleadable to an action on a bill of exchange, and that the third plea was but a repetition of the second. These two pleas were accordingly struck out. The defendant then took out a summons for leave to amend his pleas by substituting the following—first, to the first count, that the defendant did not make—secondly, that he did not indorse the bills modo et formâ—thirdly, to the third and last counts, non assumpsit—fourthly, to the whole declaration, the statute of limitations—fifthly, to all but the third count, the statute of limitations. This application was opposed; and ultimately the learned judge allowed the defendant to plead the first, second, and fourth of the proposed pleas. The defendant urged that he might be permitted to traverse Cabe's indorsement: but this the learned judge refused. In pursuance of this order the defendant pleaded—first, that he did not make the bills—secondly, that he did not indorse *to Cabe*—thirdly, the statute of limitations.

John Bayley now moved for a rule calling upon the defendant to shew cause why the amended pleas should not be made conformable to the judge's order.—He submitted, that, by pleading that he did not indorse to Cabe, the defendant put in issue two several facts; and that an issue taken upon that plea could only be supported by calling Cabe.

TINDAL, C. J.—Would not the issue be sustained by proof of the defendant's handwriting? I must confess that my mind is not subtle enough to discover the distinction that is suggested between an allegation that the defendant "did not indorse the bill modo et formâ," and that he "did not indorse to Cabe."

Bayley took nothing.

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Tuesday, Jan. 29th.

BRAYSHAW *v.* EATON.

There is no inflexible rule of law making it incumbent on a tradesman to institute inquiries as to the situation and resources of an infant before he gives him credit for necessaries.

INDEBITATUS assumpsit for goods sold and delivered. Plea, infancy. Replication, that the goods were necessaries.

At the trial before the undersheriff of Middlesex, the facts that appeared in evidence were as follow:—The defendant, whose mother lived at Newcastle-under-Lyne, was articled to an attorney in London, to whom a premium of 250*l.* had been paid with him. Between the months of January and July, 1836, he had been furnished (by a tailor named Coxhead, employed by his mother,) with two coats, two pairs of trowsers, one waistcoat, and a cloth cloak. The plaintiff's demand, the amount of which was not disputed, was 9*l.* 18*s.*—4*l.* 4*s.* for a Newmarket coat, 1*l.* 4*s.* for a waistcoat, and 4*l.* 10*s.* for a great-coat, furnished in July and August in the same year. The landlady of the house in which the defendant lodged, stated, that, if inquiry had been made of her, she could have informed the plaintiff that the defendant was amply supplied with clothes at his mother's charge. No inquiry, however, appeared to have been made as to the defendant's circumstances: and this was relied on as a ground of nonsuit.

The undersheriff declined to nonsuit, but left it to the jury to say whether the goods in question were necessaries or not. The jury found for the plaintiff.

James, on a former day in this term, moved for a rule calling upon the plaintiff to shew cause why the verdict should not be set aside, and a nonsuit entered, or a new trial had.—Before he could be entitled to recover, the plaintiff was bound to shew that he had made some inquiry as to the situation and circumstances of the defendant. In *Ford* v. *Fothergill*, 1 Esp. 211, Peake, 229, Lord Kenyon

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said "that the question of necessaries was a relative fact to be governed by the fortune or circumstances of the infant; that a person trusting an infant did it at his peril; and though it had been stated that a tradesman had no business to inquire into what dealings an infant had with others, that he was of opinion the tradesman was bound to make such inquiry; and if the infant had contracted other debts at the same time, for the same sort of articles for which the action was brought, that such was good evidence to rebut the presumption of necessaries." So, in *Cook* v. *Denton*, 3 C. & P. 114, *Story* v. *Pery*, 4 C. & P. 526, and *Burghart* v. *Angerstein*, 6 C. & P. 690, it was held, that, if a tradesman trusts an infant, he does it at his peril, and he cannot recover if it turns out that the infant has been properly supplied by his friends. And in *Mortara* v. *Hall*, 6 Sim. 465, the Vice Chancellor (Sir L. Shadwell) says: "I take it to be the law that it is the duty of those who trust infants for goods supplied to them to make themselves acquainted with their circumstances, in order that they may determine whether the articles supplied really are necessaries or not."

A rule nisi having been granted—

Wilde, Serjeant, shewed cause.—There is no ground for a nonsuit. The issue was whether or not the goods furnished by the plaintiff to the defendant were necessaries: the nature of this issue cannot be varied by the presence or absence of inquiry. Suppose the goods clearly to be necessaries, would the plaintiff be the less entitled to recover because he made no such inquiry as that suggested? or, suppose they were clearly not necessaries, would the fact of his having made the most diligent inquiries entitle him to a verdict? Certainly not. The question was properly left to the jury; and the facts fully warranted the verdict. One of the articles (viz. the great-coat), at all events, was necessary, inasmuch as it did

not appear that this was an article he had been supplied with from any other source. Is it fitting or decent that four learned judges should be occupied half a day in discussing the propriety of a young gentleman in this defendant's situation in life having a great-coat in addition to a cloak? In *Maddox* v. *Miller*, 1 M. & S. 738, it was held, that, in an action for goods sold to an infant, the issue being necessaries, if any part of the articles proved to have been furnished to the defendant may fall within the description of necessaries, the evidence ought to be left to the jury. In *Ford* v. *Fothergill*, notwithstanding the intimation of opinion given by Lord Kenyon, there was a verdict for the plaintiff; and it does not appear that any attempt was afterwards made to set aside that verdict. If the mere absence of inquiry constituted a ground of nonsuit, it is somewhat singular that his lordship did not in that case nonsuit the plaintiff—a course he was usually by no means slow to adopt. [*Bosanquet*, J.—If a tradesman supplies an infant with a reasonable quantity of goods without inquiry, he does it at the risk of its afterwards turning out that they were not necessary, by reason of authorized supplies from other quarters.]

James, in support of his rule.—The real question for the jury in a case of this sort, is, not whether the goods furnished are in the abstract necessaries, but whether the infant had need of the supply; and this could only be ascertained by inquiry. Every contract made by an infant is primâ facie void, or at least voidable: and the onus of repelling that legal presumption rests upon the plaintiff. In Bacon's Abridgment, *Infancy and Age*, (I), 1, it is said: "Strictly speaking, all contracts made by infants are either void or voidable, because the contract is the act of the understanding, which during their state of infancy they are presumed to want; yet civil societies have so far supplied that defect, and taken care of them, as to allow them to contract for their benefit and advantage, with power,

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in most cases, to recede from and vacate it when it may prove prejudicial to them: and where they contract for necessaries they are absolutely bound; and this likewise is in benignity to infants, for, if they were not allowed to bind themselves for necessaries, no person would trust them, in which case they would be in worse circumstances than persons of full age. Therefore it is clearly agreed by all the books that speak of this matter, that an infant may bind himself to pay for his necessary meat, drink, apparel, physic, and such other necessaries; and likewise for his good teaching and instruction, whereby he may profit himself afterwards. But it must appear that the things were actually necessary, and of reasonable prices, and suitable to the infant's degree and estate." Comyns's Digest, *Enfant*, (B. 5), Viner's Abridgment, *Enfant*, (C), and the cases before cited, all establish the same doctrine. It is evident that the slightest inquiry would have possessed the plaintiff of the fact that the defendant was amply supplied with clothes from other and legitimate sources.

TINDAL, C. J.—The issue presented to the jury in this case was, whether or not the goods supplied by the plaintiff were necessaries. The jury having found for the plaintiff, a motion has been made to enter a nonsuit, or for a new trial, on the ground that the undersheriff, before whom the cause was tried, omitted to tell the jury, that, to entitle the plaintiff to recover, it was incumbent on him to shew that due inquiry had been made by him as to the defendant's circumstances, before the credit was given. The question we are now called upon to determine therefore is, whether or not there is any inflexible rule of law making it necessary that inquiry should be made as to whether or not the infant has been amply furnished with similar articles from other sources, before credit is given to him. No doubt, a prudent tradesman would make such inquiry: and the total absence of inquiry would afford matter of strong observation to the jury. But, whether inquiry were made or

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not, the question for the jury would still be the same: and their verdict must depend, not upon the degree of knowledge acquired by the tradesman as to the infant's circumstances, but upon whether the goods were necessaries or not. Would the goods be the less necessaries because the tradesman obtains no information? I find it nowhere laid down that it is a duty incumbent on the tradesman to make inquiry: the proposition stated in some of the cases must be understood with reference to the prudence of such a step. The making of such inquiry may be one of those duties of imperfect obligation which one man owes to another: but I find no authority for saying it is as a matter of law essential: on the contrary, in *Ford* v. *Fothergill*, where Lord Kenyon went so far, the verdict for the plaintiff was acquiesced in. I am therefore of opinion that there is no ground for entering a nonsuit in this case.—Then, as to the evidence, it appears to me that a part at least of the goods fell within the description of necessaries, viz. the great-coat, an article with which the defendant did not appear to have been furnished elsewhere, and which it would be impossible to say was not necessary to a person in this defendant's condition in life.

VAUGHAN, J.—I am of the same opinion. The defendant's counsel contends for a proposition broader than any of the authorities warrant. A nonsuit is asked for upon a notion that the making inquiry in a case like this is a condition precedent to the plaintiff's right to recover for articles that are clearly necessaries. Whether an article is necessary or not must depend upon many collateral circumstances: *necessary*, is a word of a large and accommodating signification. Regard being had to the situation in life of this defendant, and to the prices charged for the articles, I think the verdict is unexceptionable.

BOSANQUET, J.—I am of the same opinion, though, had I been one of the jury, I should not have concurred in a

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verdict to the full amount. The great-coat at least may fairly be held to be necessary; and therefore the case was properly left to the jury. The fair result of the cases seems to me to be that the tradesman *ought* to make inquiry. But, what is the consequence if he do not? Not that he must be nonsuited even if the articles should be found to be necessaries; for, that would be the consequence of the rule contended for on the part of the defendant: but he acts at his own peril; he will be precluded from recovering if the infant is proved to be already sufficiently supplied elsewhere. The question therefore was for the jury; and I do not find their verdict to be so extravagant as to induce me to consent to its being disturbed.

ERSKINE, J.—Whether the goods were necessaries or not, was entirely a question for the jury; and this was fairly left to them. One matter for their consideration would be the nature of the supply the defendant derived from other and authorized sources. Although I might not have agreed to find to the full amount, still that is no ground for sending the cause down again. Some of the cases, it is true, seem to lay it down rather as a matter of law that inquiry should be made. But this seems to me to be a mistake. The absence of inquiry is matter of observation to the jury; but nothing more.

Rule discharged (61).

As to the costs of the rule.

James asked that the rule might be discharged without costs, on the ground that the defendant had been misled by the authorities.

TINDAL, C. J.—There is nothing in this case to warrant a deviation from the ordinary course.

(61) See Dalton v. Gib, ante, p. 117. And see Sel. Ni. Pri. edit., 128 et seq.; Rolfe v. Abbott, 6 C. & P. 286; Urmston v. Newcomen, 6 N. & M. 454.

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ADEANE *v.* MORTLOCK.

Wednesday, Jan. 30th.

By an inclosure act it was enacted that all ways over a certain field called West Field allotted to B., should be extinguished from the time of the making and completion of a new road as therein directed; with a proviso that nothing in the act should extend or be construed to extend to deprive A., his heirs or assigns, or his or their agents &c., of the right of ingress, egress, and regress to and from a water-course, for the purpose of re-building, repairing, opening, or shutting the sluices thereon, or to cleanse the same:—Held, that this reserved to A. his right of way unimpaired over West Field for the purposes in the act mentioned.

Held also, that a tenant of A. who occupied meadow land irrigated by means of the sluices, was a competent witness in an action by A. for an obstruction of this right of way.

By the 41 Geo. 3, c. lxi, an act for dividing, allotting, inclosing, and laying in severalty the open and common fields, common meadows, commonable lands, common heaths, commons, and waste grounds within the parish of Great Abington, in the county of Cambridge—s. 15, the commissioners were directed, with the consent of the owners, to set out and appoint such public carriage-roads, highways, bridle-ways, and footpaths over the lands directed to be divided and inclosed as they should think proper; and also to set out and appoint, with the consent of the owners, such private roads and ways, fences, ditches, and works, &c., over the said lands as they should think necessary or convenient; and also to stop up, alter, turn, or discontinue any old road or roads, way or ways; and it was provided, that, after the said public and private roads and ways should be set out or altered, no person should use any antient or other roads or ways, either public or private, either on foot or with horses, carriages, or cattle.

By s. 17, the commissioners were authorized and required to set out and appoint a public carriage-road across West Field, the expense of forming the same to be paid by the defendant.

By s. 18, it was enacted, that all carriage-roads, bridle-roads, and footways over or across that part of West Field to be allotted to the defendant, should be extinguished from the time the public road thereinbefore directed to be made at the expense of the defendant should have been formed and put into good and sufficient repair fit for the passage of cattle and carriages: "Provided that nothing in the act contained should extend or be construed to extend to deprive Mr. Adeane, his heirs or assigns, or his or their agents, servants, and workmen, with or without horses,

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carts, and carriages, of the right of ingress, egress, and regress to and from the antient cut or watercourse, and every part thereof, used to float certain meadow grounds in Brabraham belonging to Mr. Adeane, for the purpose of rebuilding, repairing, opening, or shutting the sluices or staunches erected on the said watercourse, nor to deprive Mr. Adeane, his heir or assigns, or his or their agents, servants, or workmen, of the liberty of ingress, egress, and regress, at all seasonable times, to and from the cut or watercourse, and every part thereof, to cleanse the said cut or watercourse, or for any other reasonable purpose relating to the watercourse."

By s. 19, it was provided, "that, whereas there was more land in the parish of Little Abington lying on the west side of the London road than Mr. Adeane could claim to be entitled to under the inclosure act, and it would be convenient that he should have the whole, he should be permitted to purchase and pay for in money all that would not otherwise be assigned or allotted to him."

The commissioners by their award made pursuant to the act, allotted West Field to the defendant's father, and certain other lands to the plaintiff's father. The defendant's father, in 1804, inclosed West Field, stopping up certain ways which had been before used by Mr. Adeane, the father, for the purpose of cleansing a certain stream or watercourse flowing through West Field to the lands allotted to Mr. Adeane, which was used by the latter for irrigating certain meadows in Brabraham belonging to him, and also for the purpose of repairing and opening and closing the hatches or sluices. One of the ways so stopped up had also been a public way. A new way to the sluices was made; but the plaintiff's servants, finding it less convenient than the old way, were in the habit of climbing over a seven foot fence which the defendant had erected across the old way, whenever they had occasion to go to the sluices, or to cleanse the stream. Steps had also been

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placed by the plaintiff's servants to facilitate their access over this fence, which it appeared the defendant caused to be removed; and nails or spikes were placed on the top of the fence to prevent their using the way. It also appeared that on one or two occasions leave had been asked when the old way was used. In 1884, the old fence was taken down, and a new one erected in its place. For this obstruction of his right of footway, the plaintiff brought the present action. The defendant by his pleas traversed the alleged right.

At the trial before Parke, B., at the last Spring Assizes for the county of Cambridge, it was contended, on the part of the defendant, that the inclosure act extinguished all previously existing rights of way over West Field, whether public or private, from the moment the new way was made.

Evidence objected to.

One Chisford, who occupied under the plaintiff a portion of the meadow land in Brabraham irrigated by means of the sluices before-mentioned, was called as a witness on the part of the plaintiff, to prove that he had frequently used the way in question, by getting over the fence at a short distance from the spot, for the purpose of opening and shutting the sluices. It was objected, on the part of the tenant, that this witness was incompetent, inasmuch as he had a direct and immediate interest in the event of the suit. On the authority, however, of *Doddington* v. *Hudson*, 8 Moore, 163, 1 Bing. 251, the learned Baron overruled the objection; holding that the witness had no such immediate interest in the result of the suit as to disqualify him. But he ordered the name of the witness to be indorsed on the postea, under the 3 & 4 Will. 4, c. 42, s. 27 (62).

(62) By which it is enacted, "that the name of every witness objected to as incompetent on the ground that such verdict or judgment would be admissible in evidence for or against him, shall at the trial be indorsed on the record or document on which the trial shall be had, together with the name of the party on whose behalf he was ex-

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Summing up.

The learned Baron told the jury that the questions for them to consider were, whether or not the right of way claimed by the plaintiff existed at the time of the passing of the inclosure act, and, if so, whether it had been since extinguished; that the act recognised in and reserved to Adeane and his successors the same rights of way as they before had for the purposes mentioned in the 18th section; that, if the right of way in question existed before the inclosure over the place obstructed by the defendant, it could only be extinguished by a release, which a jury might presume; and that twenty years' user of a way in another road, and obstruction of the way in question, would be evidence whence they might presume a release or extinguishment of the old, and a substitution of the new way; but that the evidence in the present case was extremely slender.

A verdict was found for the plaintiff on the third and fourth counts; the first and second were referred.

F. Kelly, in Easter Term last, moved for a new trial, on the ground that the witness Chisford was improperly admitted, the construction put upon the act by the learned Baron erroneous, and the verdict against the weight of evidence.—*Doe* d. *Lord Teynham* v. *Tyler*, 4 M. & P. 29, 6 Bing. 390, was cited.

1. As to the construction of the act.

Biggs Andrews and *Byles*, on a former day in this term, shewed cause.—1. The right of way the obstruction of which the plaintiff complains of is essential to his enjoyment of the watercourse: and it is quite clear that the reservation in the 18th section of the inclosure act was introduced for

amined, by some officer of the court, at the request of either party, and shall be afterwards entered on the record of the judgment; and such indorsement or entry shall be sufficient evidence that such witness was examined, in any subsequent proceeding in which the verdict or judgment shall be offered in evidence."

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the express purpose of securing to Mr. Adeane and his successors this right unimpaired. The act extinguishes only those ways for which the public road is given as an equivalent. The act of parliament is in the nature of a contract between the parties; and is to be construed most strongly against Mortlock, and in favour of Adeane—*Scales* v. *Pickering*, 1 M. & P. 195, 4 Bing. 448.

The evidence was properly left to the jury: it was certainly somewhat conflicting; but, upon the whole, it greatly preponderated in favour of the plaintiff.

2. As to the competency of the witness.

2. It is difficult to perceive on what ground Chisford can be said not to be a competent witness. He was not interested directly and immediately in the result of the action: nor could the verdict be used for or against him on any future occasion. The case of *Doddington* v. *Hudson*, 8 Moore, 163, 1 Bing. 257, is expressly in point. It was there held, that, in an action on the case by a reversioner, for an injury done to his inheritance, the tenant in possession is a competent witness to prove the nature and extent of the injury, as the verdict cannot be given in evidence either for or against him, and as no benefit could result to him from his own testimony; and that, although his credit might be affected, it would not destroy his competency. Park, J., in delivering the judgment of the court, there says: "The rule on which the court has grounded its decision in this case is to be found in *Bent* v. *Baker*, where Lord Kenyon said, that, 'Wherever there are not any positive rules of law against it, it is better to receive the evidence of the witness, making, nevertheless, such observations on the credit of the party as his situation requires. The general question put to a witness on his voir dire amounts to this, whether the record in the cause will affect his interest. I must acknowledge that there have been various opinions upon this subject, and that it is impossible to reconcile all the cases. Then we have only to consider what are the principles and good sense to be

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extracted from them all. I think the principle is this, if the proceedings in the cause cannot be used for him, he is a competent witness, although he may entertain wishes upon the subject, for that only goes to his credit, and not to his competency; as, where he stands in the same situation with the party for whom he is called to give evidence, there is no doubt but that it may influence his testimony; or, where a father is giving evidence for the son: but this does not render him incompetent; and such circumstances are always open to observation.'" That case has always been considered an authority upon this subject.

1. As to the construction of the act.

Wilde, Serjeant, *Kelly*, and *Gunning*, in support of the rule.—It was clearly a misdirection to tell the jury that the act of parliament left to Mr. Adeane all his rights undiminished. The allotment made to Mr. Adeane under the act, was an ample consideration for the renunciation by him of the several rights he before enjoyed over the land allotted to Mr. Mortlock. If the construction contended for on the part of the plaintiff is correct, the act of parliament would be altogether nugatory as far as regards Mr. Mortlock. By the 15th section of the act the commissioners are required to set out certain public and private roads and paths. The 17th section qualifies the rights Mr. Mortlock is to derive from the allotment of West Field. The 18th section extinguishes all pre-existing rights of way over West Field, including that over the locus in quo, subject to a reservation or exception of Mr. Adeane's right as therein mentioned. If, as is contended for on the other side, Mr. Adeane's rights are reserved to him as fully as he before enjoyed them, what benefit does Mr. Mortlock derive from the allotment? To hold that the clause requires anything more than that a convenient access to the watercourse and sluices should be secured to Mr. Adeane, would be putting upon it a construction most unreasonable and unjust. A seven foot fence having been erected across

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the locus in quo immediately after the passing of the act, and having been continued with little variation down to the present time, without opposition, and without complaint the jury ought to have been directed to presume that Mr. Adeane's right, if not destroyed by the act, was at all events extinguished by a release.

2. As to the competency of the witness.

2. The witness whose testimony was admitted had a direct legal interest in supporting the action. The question at issue was a right of way: the ultimate result would operate upon the thing itself; and this is the principle upon which a tenant in ejectment is not a competent witness in support of his landlord's title. Whatever benefit accrues to the land in the witness's occupation from the removal of the obstruction complained of, will be enjoy d by the witness himself. In the event of the plaintiff succeeding in the action, and the alleged nuisance being discontinued, who is it that will enjoy the right of way? Not the plaintiff; but the witness. It is true that the verdict and judgment in this action (for the plaintiff) will not put the witness in possession of any right, or be evidence for him on any future occasion. But a verdict establishing the right claimed puts an end to the question. [*Tindal*, C. J. —The witness is not interested in the event of the suit: you cannot put it higher than that he has an interest in the question?] A verdict for the plaintiff will enable the witness to use the way. Courts of Justice and the Legislature have of late been pursuing diametrically opposite courses upon the subject of evidence: while the latter are evincing a studied anxiety to exclude oral testimony in all possible cases, the former are taking credit to themselves for their liberality in letting it in. It is difficult to conceive an interest more direct and immediate than that of the witness in this case: the benefit to him is as certain to flow from the verdict as if a writ of execution put him directly in possession of it. *Doddington* v. *Hudson* was a totally different case. That was an action to recover a compensation

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for a by-gone injury: the damages could by no possibility enure to the benefit of the witness; and there was no right the enjoyment of which would be secured to him by a verdict for the plaintiff.

Cur. adv. vult.

1. As to the construction of the act.

TINDAL, C. J.—I am of opinion that the rule that has been obtained for a new trial in this case must be discharged. At the trial there was but one right of way at issue between the parties—the right of the plaintiff to enter the defendant's premises at the place where a certain fence had been set up across the former common and public footway. It appears to me that the intention of the act of parliament was merely to extinguish the common and public footways across West Field. But the plaintiff, it seems, had something more than this right of footway that was common to all the public: he had a right to deviate from the path at various places for the purpose of watching the stream running nearly parallel thereto. When the act of parliament was passed, providing "that all carriage-roads, bridle-roads, and footways over and across that part of West Field which is to be allotted to Mr. Mortlock, shall be extinguished from the time the public road is set forth," undoubtedly the way as far as the public were concerned was altogether extinguished. But there is in the act an exception in favour of the plaintiff. The words of the exception are—"Provided always that nothing in this act shall extend or be construed to extend to deprive Mr. Adeane, his heirs and assigns, or his or their agents, servants, and workmen, with or without horses, carts, and carriages, of the right of ingress, egress, and regress to and from the antient cut or watercourse, and every part thereof, used to float certain meadow grounds in Brabraham belonging to Mr. Adeane, for the purpose of re-building, repairing, opening, or shutting the sluices or staunches erected on the said watercourse, nor to deprive Mr. Adeane, his heirs

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signs, or his or their agents, servants, or workmen of liberty ingress, egress, and regress at all seasonable to and from the cut or watercourse, and every part of, to cleanse the said watercourse, or for any other nable purpose relating to the said watercourse." In st place, commenting only upon the particular words is exception—the act shall not extend to deprive deane of *the* right of ingress, &c., to and from the ourse, &c.—it is clear that some right previously d. Omnis privatio præsupponit habitum. The words exception expressly point to the right Mr. Adeane efore the passing of the act. And undoubtedly the of the evidence shewed that he had exercised the at the place in question. There was, it is true, evi- that Mr. Mortlock, shortly after the passing of the aused a fence to be erected with spikes or nails e top. One may easily conceive that Mr. Adeane l acquiesce in anything being set up that would keep ublic out, so long as his servants had the means of to the watercourse, without thereby meaning to nce his right. There was some evidence also that had been placed by Mr. Adeane's servants to enable to get over the fence, and that these steps were after- removed, and on one or two occasions leave asked to he old way. But the great preponderance of the ce was the other way; and the whole case was fully operly left to the jury. I therefore think, that, as pon the construction of the act of parliament, as he evidence given in the cause, the first branch of le fails.

2. As to the competency of the witness.

second question is, whether, in an action by a oner against a stranger for an injury to the rever- an action sounding in damages—the tenant is a tent witness for the plaintiff. He certainly may be ed to have a considerable bias on his mind, inas-

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much as the result of the action one way would remove the nuisance complained of. But that is no more than a possible or a probable advantage to him, going to his credit, not to his competency.

Upon both grounds therefore I think the rule must be discharged.

1. As to the construction of the act.

VAUGHAN, J.—I am of the same opinion. It is admitted that the right of way claimed by the plaintiff was enjoyed by his father before the passing of the act of inclosure: and the question is whether or not that right has since been either destroyed by the act of parliament or extinguished by a release. The act contains the usual clauses impowering the commissioners to stop up old ways and mark out new ones. The words of the 18th section—"that all carriage-roads, bridle-roads, and footways over or across that part of West Field to be allotted to Mr. Mortlock shall be extinguished from the time the public road thereinafter directed to be made at the expense of Mr. Mortlock should have been formed and put into good and sufficient repair fit for the passage of cattle and carriages"—if they had rested there, are large enough to extinguish the right of way claimed by the plaintiff: but, looking at the proviso, it appears to me that that right could not have been reserved in larger or more explicit terms; the way is clearly referred to as an existing way. The right in question is most unequivocally reserved to the plaintiff. Then, if reserved by the act of parliament, has it since been extinguished? This depends upon the evidence. Non-user of a way, another having in the meantime been used, is undoubtedly strong evidence to shew a release or extinguishment of the former. But, what was the evidence upon the subject? There was conflicting testimony as to the user, the defendant's witnesses stating that leave had been asked, and the plaintiffs' shewing numberless acts of user without leave. It was

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therefore purely a question for the jury whether or not the evidence established an abandonment of the right. I think there was no foundation for presuming a release.

2. As to the competency of the witness.

As to the competency of the witness. I had thought the point settled ever since the case of *Doddington* v. *Hudson*. The old rule was, that a witness was not incompetent unless he had a direct interest in the event of the suit, or the record would be evidence for or against him in another suit. This has no resemblance to the case of a tenant called to defend his landlord's possession in an action of ejectment; for, a verdict that takes away the landlord's right destroys the tenant. A very elaborate judgment was delivered by the late Mr. Justice Park in *Doddington* v. *Hudson*, where the doctrine of Lord Kenyon in *Bent* v. *Baker*, 3 T. R. 32, was acted upon. The late act, 3 & 4 Will. 4, c. 42, ss. 26, 27, puts the matter beyond doubt; and, ex abundanti cautelâ, the name of the witness here has been indorsed upon the record.

Upon the whole I am clearly of opinion that the jury were properly directed, and that they have properly decided the case.

1. As to the construction of the act.

BOSANQUET, J.—I am of the same opinion. The 18th section of the act, after enacting that all carriage-roads, bridle-roads, and footways over and across that part of West Field allotted to the defendant, shall be extinguished, goes on to provide "that nothing in the act contained shall extend, or be construed to extend to *deprive* the plaintiff, his heirs or assigns, or his or their agents, servants, &c., with or without horses, carts, and carriages, of *the right* of ingress, egress, and regress to and from the antient cut or watercourse, and every part thereof, used to float certain meadow grounds in Brabraham belonging to the plaintiff, for the purpose of re-building, repairing, opening, or shutting the sluices or staunches erected on the said watercourse; nor to deprive the plaintiff, his heirs

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or assigns, or his or their agents, servants, or workmen, of the liberty of ingress, egress, or regress, at all seasonable times, to and from the said cut or watercourse, and every part thereof, to cleanse the said cut or watercourse, or for any other reasonable purpose relating to the watercourse." That this way (whether as a public or as a private way) was shut up by the defendant, is not disputed; nor is it contended upon this record that the plaintiff has a right of way over the locus in quo for all purposes: but it is contended that the act of parliament has reserved to him a fit and convenient access to the watercourse: and this the defendant insists has been done sufficiently to satisfy the words of the act. The word *deprive* undoubtedly means, to take away something that the party before had: and, when the act says that the plaintiff shall not be *deprived* of the right of ingress, &c., it evidently means that the right he then had shall be continued in him for the purposes reserved by the act.

2. As to the competency of the witness.

The question as to the admissibility of the witness was decided in *Doddington* v. *Hudson*. The objection was not tenable even before the passing of the 3 & 4 Will. 4, c. 42: and it clearly is not now. A witness can only be said to be interested in the event of the suit where he may derive some benefit or avert some responsibility by the production of the verdict and judgment. Such cases may occur; but they are rare; and this is not one of them. The verdict and judgment in this case clearly would not avail the witness in an action against him at the suit of the present defendant for using the way in question: therefore he has no such immediate interest in the result of the suit as to render him incompetent.

1. As to the construction of the act.

ERSKINE, J.—The plaintiff's right of access to the watercourse is not denied: but the question is whether, in the exercise of that right, he is to be debarred from ingress at a particular spot. At the time the act passed, it appears,

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the plaintiff's father enjoyed two several rights of way over the locus in quo—the one, in common with the rest of the public—the other, a private right, for the purpose of cleansing the stream, repairing the sluices, &c. The public right is extinguished by the act: but the proviso in the 18th section reserves to the plaintiff the right of ingress for the purposes for which the right is now claimed. The object of the act clearly was, to reserve to the plaintiff the private right he had before exercised: and there is nothing in the evidence to shew that this right has been released.

With regard to the admissibility of the witness, I can add nothing to what has already been said.

Rule discharged.

MADDISON *v.* BACON.

Wednesday, Jan. 30th.

In an action to recover a large sum, a verdict having been found for the defendant, and a new trial directed on payment of costs, the Master, on taxing the defendant's costs, disallowed the briefs and fees to the junior counsel and the consultation fees (on the ground that the briefs disclosed no witnesses for the defence), and also the journies and attendance of the defendant's attorney (from Bath):—The court directed the Master to review his taxation.

ASSUMPSIT for 1,000*l.* money lent. Plea, non assumpsit. The question was whether the money was lent upon the credit of the defendant or on that of one Hale: the evidence at the trial (which took place before Tindal, C. J., at the Sittings at Westminster after Hilary Term, 1838), chiefly consisted of the examinations of the defendant and Hale under a fiat in bankruptcy issued against the latter. A verdict was found for the defendant. In Easter Term last a rule nisi was granted for a new trial, on the ground that the verdict was against evidence: this rule was afterwards made absolute on payment of costs.

On taxing the defendant's costs, the Master disallowed the briefs and fees to the junior counsel, on the ground that there appeared to be no witnesses to examine on the part of the defendant, and also the costs of consultations on the trial and rule: he also disallowed the costs of

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journies from Bath and attendances in London of the defendant's attorney. The plaintiff and defendant both resided at Bath.

Talfourd, Serjeant, on a former day in this term, obobtained a rule calling upon the plaintiff to shew cause why the taxation should not be reviewed, on the ground that the above charges were improperly disallowed.

Wilde, Serjeant, and *Ogle*, now shewed cause.—The charges disallowed are wholly in the discretion of the Master. Much waste of time must ensue if the court will under any circumstances interfere with that discretion. With regard to the attendance of the Bath attorney, it no where appears that he came to London for the sole purpose of attending the trial of this cause, or the argument on the rule.

Talfourd, Serjeant, in support of his rule.—Though true it is that the court will not in general interfere where the matter is properly for the Master's discretion, that principle cannot apply to a case so peculiarly circumstanced as the present, the importance of which to the characters and interests of the parties the Master had not (as the court have) the means of estimating. Besides, here the question is one of principle not of mere discretion. The Master has proceeded upon a notion that two counsel could not be necessary, because it did not appear from the briefs that the defendant had any witnesses to call. Much would in such a case as this depend upon the cross-examination of the plaintiff's witnesses: and a single counsel would be placed in a situation of extreme embarrassment if deprived of the assistance of a junior who could take a note of the cross-examination. The disallowance of the consultations was a consequence of that of the second counsel.

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TINDAL, C. J.—Under the peculiar circumstances of the case, it may perhaps be as well that the Master should review his taxation.

The rest of the court concurring—

Rule absolute.

FECTOR *v.* BEACON.

Thursday, Jan. 31st.

THESIGER, in Michaelmas Term last, obtained a rule nisi to enter up judgment against the defendant on the Speaker's certificate, for 620*l.* 15*s.* 10*d.*, in pursuance of the statute 9 Geo. 4, c. 22, s. 63, which enacts "that it shall and may be lawful for the party or parties entitled to such costs and expenses, or for his, her, or their executors or administrators, to demand the whole amount thereof so certified as above from any one or more of the persons respectively who are thereinbefore made liable to the payment thereof in the several cases thereinbefore mentioned, and in case of nonpayment thereof to recover the same by action of debt in any of his majesty's courts of record at Westminster, in which action it shall be sufficient for the plaintiff or plaintiffs to declare that the defendant or defendants is or are indebted to him or them in the sum to which the costs and expenses ascertained in manner aforesaid shall amount, by virtue of the act; and the certificate of such amount, so signed as aforesaid by the Speaker, shall have the force and effect of a warrant to confess judgment; and the court in which such action shall be commenced shall, upon motion, and on the production of such certificate, enter up judgment in favour of the plaintiff or plaintiffs named in such certificate, for the sum specified therein to be due from the defendant or defendants in such action, in like manner as if the said defendant or defend-

The clauses of the statute 9 Geo. 4, c. 22, which regulate the mode of ascertaining the amount of the costs of proceedings before an election committee, are to be favourably construed; and every fair intendment is to be made in support of the jurisdiction under which the Speaker acts.

It is no objection to a certificate in favour of the sitting member, that the costs of an elector admitted before the committee as a party to defend the return, are included in the amount of the taxation; the certificate of the Speaker being by s. 60 declared to be conclusive evidence of *the amount* of the costs.

The party entitled to costs under the Speaker's certificate may demand such costs of and bring his action against any one of several parties by the certificate declared liable to pay the same.

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ants had signed a warrant to confess judgment in the said action to that amount."

The affidavit upon which the motion was founded, set out the Speaker's certificate, which was as follows:—

Speaker's certificate.

"Whereas John Rickman, Esq., clerk assistant of the House of Commons, and James William Farrer, Esq., one of the Masters of the High Court of Chancery, who were duly authorized and directed by me, in pursuance of an act passed in the ninth year of the reign of his majesty King George the Fourth, intituled, 'An Act to consolidate and amend the law relating to the trial of controverted elections or petitions of members to serve in parliament,' to examine and tax the costs and expenses incurred by John Minet Fector, Esq., sitting member for the borough of Maidstone, have reported to me the amount thereof; I do hereby certify that the costs and expenses allowed in the said report amount to the sum of 620*l.* 15*s.* 10*d.*, and that George Beacon, George Powell, William Lucking Wright, William Jury, Walter Harris, and William Richard Brown, who signed the petition complaining of an undue election and return for the said borough, declared by the select committee appointed to try the merits of the said petition, to be frivolous and vexatious, are liable to pay the same:

"Given under my hand this 6th day of August, 1838.

"J. Abercromby, Speaker."

The affidavits then proceeded to state, that the plaintiff, by deed-poll, had appointed Mr. Hart his attorney to demand and receive the sum mentioned in the certificate from the persons named therein, and each of them; that Hart served the defendant with a copy of the certificate and deed-poll, shewed him the originals, and demanded payment of the 620*l.* 15*s.* 10*d.*, but that it was never paid by the defendant or any other person liable; that, in September, 1838, a writ of summons in an action of debt for 620*l.* 15*s.* 10*d.* was sued out against the defendant, and

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rsonally served upon him, indorsed with the name and place of abode of Hart as such attorney as aforesaid; that, in October, the defendant not having appeared, an appearance was entered for him by Bower & Back, Hart's agents, and soon afterwards notice was given by James Coppock that he was the defendant's attorney, and would receive a declaration; that, in November, a copy of the declaration was delivered to Coppock, and another copy was filed at the Masters' office, which declaration was as follows:—

Declaration.

"Kent (to wit). John Minet Fector, Esq., the plaintiff in this suit, by Richard Hart, his attorney, complains of George Beacon, the defendant in this suit, who has been summoned to answer the said plaintiff in an action of debt; and the said plaintiff demands the sum of 620*l.* 15*s.* 10*d.*, which the said defendant owes to and unjustly detains from him: For that whereas the said defendant, heretofore, to wit, on the 18th of September, 1838, was indebted to the said plaintiff in the sum of 620*l.* 15*s.* 10*d.* by virtue of a statute made and passed in the ninth year of the reign of King George the Fourth, to consolidate and amend the laws relating to the trial of controverted elections or returns of members to serve in parliament: whereby and by force of the said statute an action hath accrued to the said plaintiff to demand and have of and from the said defendant the said sum of 620*l.* 15*s.* 10*d.*, being the said sum above demanded: yet the said defendant, although often requested so to do, hath not yet paid the said sum above demanded, or any part thereof, to the said plaintiff, but so to do hath hitherto wholly refused, and still refuses, to the damage of the said plaintiff of 50*l.*, and therefore he brings his suit &c."

That the day after the declaration was filed the defendant was served with notice thereof, and with a copy of the particulars of the plaintiff's demand. Copies of all the documents were annexed to the affidavits; and the sig-

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nature of the plaintiff to the power of attorney was verified.

Affidavit in answer.

Coppock's affidavit in answer to the motion, was as follows:—

Notice of taxation.

That, having undertaken, in the absence of Mr. Northouse, parliamentary agent, to attend the taxation of the costs referred to in the following notice—"Maidstone borough: We, the examiners appointed to tax the cost and expenses of Mr. Hart in the matter of the above election, have appointed Thursday, the 2nd day of August at 4 o'clock in the afternoon, in one of the committee rooms of the House of Commons. J. W. Farrer; W. G. Rose, clerk to the taxation. House of Commons, July 30th, 1838"—he went to the office of Mr. Rose, clerk of the recognizances on election petitions, and clerk to the taxation of costs, at the offices of the House of Commons in Parliament Street, and there inspected the original application for taxation previous to the appointment to tax, in order to ascertain if the proceedings were regular and according to the statute:

That the original application upon which the reference was made by the Speaker, and upon which such appointment to tax had proceeded, was as follows:—

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nature of the plaintiff to the power of attorney was verified.

Affidavit in answer.

Coppock's affidavit in answer to the motion, was as follows:—

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That, having undertaken, in the absence of Mr. Northouse, parliamentary agent, to attend the taxation of the costs referred to in the following notice—"Maidstone borough: We, the examiners appointed to tax the costs and expenses of Mr. Hart in the matter of the above election, have appointed Thursday, the 2nd day of August, at 4 o'clock in the afternoon, in one of the committee rooms of the House of Commons. J. W. Farrer; W. G. Rose, clerk to the taxation. House of Commons, July, 30th, 1838"—he went to the office of Mr. Rose, clerk of the recognizances on election petitions, and clerk to the taxation of costs, at the offices of the House of Commons in Parliament Street, and there inspected the original application for taxation previous to the appointment to tax, in order to ascertain if the proceedings were regular and according to the statute:

That the original application upon which the reference was made by the Speaker, and upon which such appointment to tax had proceeded, was as follows:—

Application to refer to taxation.

"Sir—In pursuance of the act 9 Geo. 4, c. 22, we are directed to transmit to you a copy of Mr. Hart's account against the petitioners in the Maidstone election, and to request you to have the same taxed in the usual way.

"We are, Sir,
"Your obedient humble servants,
"Bower & Back,
"46 Chancery Lane,
"27th July, 1838."

"To the Rt. Hon. the Speaker of the House of Commons."

That, annexed to the application above set forth was an

appointment signed by the Speaker of the House of Commons, as follows:—

Appointment of examiners.

"By virtue of the powers given to the Speaker of the House of Commons by an act passed in the ninth year of the reign of his majesty King George the Fourth, I do hereby nominate and appoint John Rickman, Esq., clerk assistant to the House of Commons, and James W. Farrer, Esq., one of the Masters of the High Court of Chancery, to examine and tax the costs and expenses mentioned in the requisition hereunto annexed; and the said John Rickman and James W. Farrer are to report to me the amount thereof, together with the name of the party liable to pay the same.

"Given under my hand this 30th of July, 1838.

"J. Abercromby, Speaker."

That the requisition so referred to in the said nomination and appointment of the said examiners, was the requisition signed "Bower & Back" above set forth; that the deponent also inspected the original document signed by the said John Rickman and James W. Farrer, a copy of which had been served on the clerk of Mr. Northouse at the office of the latter, by which the taxation had been fixed for the 2nd of August, which document was as follows:—

Appointment to tax.

"Maidstone Borough.—We, the examiners appointed to tax the costs and expenses of Mr. Hart in the matter of the above election, have appointed Thursday, the 2nd of August, at 4 o'clock in the afternoon, in one of the committee rooms of the House of Commons, for such taxation.

"W. G. Rose, "J. Rickman.

"Clerk to the taxation. "J. W. Farrer."

"House of Commons, July 30th, 1838."

That, on the 2nd of August, deponent attended at the place appointed for the taxation of the said costs and expenses of Mr. Hart; at which taxation the said John Rickman and James W. Farrer presided; and W. G. Rose, clerk to the taxation, attended with all the documents and

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papers referred to in this affidavit; and the said W. G. Rose did in the presence of the examiners, and as preliminary to the said taxation, read the requisition of Messrs. Bower & Back, above set forth, to tax the costs and expenses of Mr. Hart, and the nomination and appointment by the Speaker of the House of Commons of John Rickman and James W. Farrer to tax the costs mentioned in the requisition, annexed to the nomination and appointment, as above set forth; and deponent then objected to the power of the said examiners to tax the said costs, and protested against their proceeding with the taxation; but that the said examiners nevertheless proceeded to tax and did tax the same:

Costs of two several parties taxed.

That the costs so taxed by the examiners contained separate and distinct costs and charges for the opposition of two several and distinct parties; and that one part of the bill contained the costs purporting to be incurred in and about the preparing and presenting and prosecuting a petition from and on behalf of an elector, whose name is not mentioned in the said bill, and consequent upon the same, which costs were not costs or expenses incurred by, and were not and did not by the said bill purport to be incurred by the said John Minet Fector:

That, after the taxation of the said costs, the examiners returned to the Speaker a report, which was shewn to deponent by the proper officer at the House of Commons, and which report, signed by the examiners, was as follows:—

Examiners' report.

"Maidstone Election.—In pursuance of the within-mentioned order of the Right Honorable the Speaker of the House of Commons, dated the 30th day of July last, and herewith returned, We, the examiners thereby appointed, do certify, that, in obedience thereto, we have examined and taxed the costs and expenses mentioned in the said order: and we do hereby report to the Right Honorable the Speaker of the House of Commons that

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the costs and expenses allowed by us on such taxation, amount to the sum of 620*l.* 15*s.* 10*d.*: and we do further report that George Beacon, George Powell, William Lucking Wright, William Jury, Walter Harris, and William Richard Brown, who signed the petition from the borough of Maidstone, found by the select committee to be frivolous and vexatious, are to pay the same.

"Given under our hands the 2nd day of August, 1838.

"John Rickman.

"James W. Farrer."

Costs allowed in one aggregate sum.

That the costs mentioned and allowed by the examiners in the last-mentioned report or document, were composed of and comprised costs and expenses incurred by two separate and distinct parties before the committee; and that the said report included and contained such separate costs in one general aggregate sum, without distinguishing the respective costs and expenses incurred by each of the said distinct and separate parties; that deponent searched the minutes of the proceedings of the select committee of the House of Commons upon the said Maidstone election petition, and that the following was the entry thereon, so far as the same related to the attendance of parties, agents, or counsel:—

Minutes.

"*Mercurii*, 18° *die Julii*, 1838.—Names called over: all present. Petition of George Beacon and others, electors, read. Agent, Mr. Northouse. Counsel, Mr. Hill, Mr. Cockburn, Mr. Palmer.

"For sitting members, and Joseph Benstead and others, admitted parties to defend the return—Agents, Dyson & Hall. Counsel, Mr. Austin, Mr. Talbot.

"Adjourned till to-morrow at eleven o'clock.

"*Jovis*, 19° *die Julii*, 1838.—Names called over: all present. Mr. Thesiger appeared as counsel for the sitting member, in addition to the counsel who appeared yesterday."

Hart not agent.

That there were not any persons named as agents upon

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the minutes of the committee, other than the said Mr. Northouse and Messrs. Dyson & Hall: that deponent searched the book kept at the office of the House of Commons, from its first commencement, on the 13th March, 1837, to the present time; that the name of Richard Hart did not appear therein; and that Richard Hart was not qualified to act as a parliamentary agent upon any petition before the House of Commons, according to the rules issued by the Speaker, in pursuance of resolutions of the House of Commons.

That, since the issuing of the certificate of the Speaker of the House of Commons, deponent inquired of the said J. W. Farrer, one of the examiners, as to any costs taxed by him jointly with John Rickman, in the matter of the Maidstone election petition; and the said J. W. Farrer informed deponent on the 19th of November instant (which information deponent believed to be true), that the only costs taxed by him in the matter of the Maidstone election petition, were those taxed in pursuance of the order and nomination of the Speaker of the House of Commons, above set forth.

That Joseph Benstead was, upon petition, admitted as a party to defend the return of Mr. Fector; and that separate actions had been brought against, and declarations delivered to, Powell, Wright, Jury, Harris, and Brown, for the same 620*l.* 15*s.* 10*d.* mentioned in the Speaker's certificate.

Separate actions brought on the certificate against all the parties.

Wilde, Serjeant, and *Cockburn*, shewed cause.—The liability to costs is created by the 57th section, which enacts, "that, whenever any committee appointed to consider the merits of any petition complaining of an undue election or return, or of the omission to return any member or members to parliament, shall report to the House with respect to any such petition that the same appeared to them to be frivolous or vexatious, the party or parties, if any, who shall have appeared before the committee in opposition to

9 Geo. 4, c. 22, s. 57.

such petition, shall be entitled to recover from the person or persons, or any of them, who shall have signed such petition, the full costs and expenses which such party or parties shall have incurred in opposing the same, such costs and expenses to be ascertained in the manner hereinafter directed."

The manner of ascertaining these costs is pointed out by section 60, which is not very artificially drawn. It enacts "that the costs and expenses of prosecuting or opposing any petition presented under the provisions of the act, and the costs, expenses, and fees which shall be due and payable to any witness summoned to attend before such committee, or to any clerk or officer of the House of Commons, upon the trial of any such petition, shall be ascertained in manner following, that is to say, that, on application made to the Speaker of the House of Commons within three months after the determination of the merits of such petition, by any such *petitioner*, *party*, *witness*, or *officer*, as before mentioned, for ascertaining such costs, expenses, or fees, the Speaker shall direct the same to be taxed by two persons, of whom the clerk or one of the clerks assistant of the House shall always be one, and one of the following officers, not being a member of the House, shall be the other, that is to say, Masters in the High Court of Chancery, clerks in the court of King's Bench, Prothonotaries in the court of Common Pleas, and clerks in the court of Exchequer; and the persons so authorised and directed to tax such costs, expenses, and fees, shall and they are thereby required to examine the same, and to report the amount thereof, together with the name of the party liable to pay the same, to the Speaker of the said House, who shall, upon application made to him, deliver to the party or parties a certificate, signed by himself, expressing the amount of the costs, expenses, and fees allowed in such report, together with the name of the party liable to pay the same; and the persons so appointed to tax such costs,

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expenses, and fees, and report the amount thereof, are hereby authorised to demand and receive for such taxation and report such fees as shall be from time to time fixed by any resolution of the House; *and such certificate so signed by the Speaker shall be conclusive evidence of the amount of such demands in all cases and for all purposes whatsoever*; and the witness, officer, or party claiming under the same, shall, upon payment thereof, give a receipt at the foot of such certificate, which shall be a sufficient discharge for the same.

The application to enter up judgment upon the certificate of the Speaker in this case is open to three objections —first, that the costs therein mentioned have not been ascertained and taxed in the manner prescribed by the statute—secondly, that it includes costs to which Fector is not entitled—thirdly, that the action should have been brought against all the parties named in the certificate.

1. Costs not ascertained in the manner prescribed by the act.

1. Before this court will lend their aid to enforce the Speaker's certificate, they must be satisfied that the provisions of the statute have been strictly complied with. In *Bruyeres* v. *Halcomb*, 5 N. & M. 149, 3 Ad. & E. 381, it was expressly determined that the court will not allow judgment to be entered up, under the 9 Geo. 4, c. 22, on a certificate of the Speaker of the House of Commons for the costs of opposing an election petition, where it appears upon affidavit that the certificate was founded upon the report of a select committee for trying the merits of the petition, which was not duly appointed according to the provisions of that act. It appeared in that case that the defendant, in 1830, was a candidate to represent the town of Dover in parliament, and that Sir John Rae Reid was declared duly elected. The defendant petitioned against the return; and the House of Commons ordered that the petition should be taken into consideration on the 8th March, 1831, at three o'clock in the afternoon; but neither the defendant nor any person on his behalf attended the

House at that time or within one hour after the time appointed for calling on the parties to proceed to the appointment of a select committee to try the merits of the petition, according to the statute. The House, however, balloted for and appointed a select committee to try the petition, neither the defendant nor his counsel or agent being present or having an opportunity of striking out eleven names from the list of members to be chosen by ballot; nor did the defendant know by whom the eleven names were struck out on his behalf. On the 9th the committee met to try the merits of the petition; the defendant not attending to support it, either in person or by his counsel or agent: and it was decided that Sir John Rae Reid was duly elected, that the petition was frivolous and vexatious, and that the opposition to it was not frivolous or vexatious. The costs of the plaintiff as returning officer, in opposing the petition, were taxed, and the Speaker made his certificate pursuant to the statute. On a motion to enter up judgment under the 63rd section of the statute, it was contended, on the part of the defendant, that, there being under the circumstances no power to appoint a committee (s. 3), the certificate was irregular, and could not be enforced. On the other hand, it was contended that the Speaker's certificate was final, and the court were not at liberty to inquire into the grounds upon which it was given. Lord Denman, in delivering the judgment of the court, said: "It was objected at the Bar, that none of the courts in Westminster-Hall are at liberty to inquire into the legality of proceedings by the House of Commons, nor can do so consistently with the respect due to the privileges of that body. It is unnecessary to enter upon that general question in the present case, for, in this instance at least, we are bound to institute the inquiry, as our assistance is prayed to give effect to the Speaker's certificate; and we should be unwarranted in issuing our process to that end, unless we saw that his certificate was

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founded on a proceeding legal by the act of parliament, and in compliance with those general principles of justice which are binding on all jurisdictions. The certificate by itself possesses no authority to issue process; recourse must be had to the act for that purpose; and obviously that can only be in cases where the act applies. If this were otherwise, the Speaker's certificate that A. owed B. a sum of money, without more, would authorise, nay, compel the court to issue execution against B., to seize his goods, and throw him into prison. But the Speaker's certificate here produced plainly refers to the 60th section of the statute, for, it recites a report of examiners appointed under its provisions, and by them empowered to tax the costs of prosecuting or opposing any petition presented under the provisions of that act. But these costs become due by the 57th section, already cited, the words of which, it is true, apply to 'any committee appointed to try the merits;' but we think they must be confined to committees *duly* appointed under the act, and possessing the powers it confers. The House of Commons does not by virtue of this act lose its power to appoint an unsworn committee to try the merits of an election, by the examination of witnesses not upon oath; many cases may be supposed in which this ought to be done; but, though the decision of such a committee should be that a petition was frivolous and vexatious, it is clear that the liability to pay costs would not ensue, nor, if they should be awarded, could payment be enforced in a court of law. The 30th section has also been supposed to give validity to any committee de facto appointed, and supersede all inquiry into the process actually pursued in appointing it. The words are, 'The said eleven members shall be sworn at the table well and truly to try the matter of the petition referred to them, and a true judgment to give according to the evidence, and *shall be deemed and taken* to be a select committee *legally* appointed to try and determine the merits of

the return or election appointed by the House to be by them taken into consideration, from and after the time of any such select committee having been sworn at the table.' And these words may possibly have been introduced with the intention of dispensing with the necessity of proof of the facts which must concur to give a committee jurisdiction, though they are not very well selected for the purpose. But they do not exclude proof that the preliminary facts never took place, nor prevent the consequence that the jurisdiction never was created. The proof in the present instance is, that the committee was appointed in such a state of things that the statute positively required that it should not be appointed: it therefore had no power over the petitioner: their report that his petition was frivolous and vexatious, they had no right under the statute to make: the Speaker could not lawfully put the examiners in motion to tax the costs; their report was an unauthorized statement of an immaterial fact; and the Speaker's certificate of its being made could give it no authority."

The Speaker's certificate is by s. 60 declared to be conclusive evidence *of the amount of the demand;* but it is conclusive as to nothing else. The Speaker is to certify the amount of the costs allowed in the report of the taxing officers, together with the name of the party liable to pay the same. It is no part of his duty to ascertain the party to whom those costs are payable: and therefore Fector's name may be considered as expunged from this certificate. What, then, is there before the court to shew Fector's right to these costs? The bill referred to taxation on the requisition of Messrs. Bower & Back, was not a bill against Fector: it comprises costs to which Fector was not and could not be liable—the costs of one who appeared as a party in his own right to defend the return. However important the matter, however dignified the officer who is put in motion, the authority calling him into existence must be strictly and faithfully pursued. His act is purely

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ministerial—*Strachey* v. *Turley*, 7 East, 507, 11 East, 194. He is merely to certify the amount of costs reported to him by the examiners, and the names of those who are represented to him to be liable to pay those costs. The examiners are to tax such bills as are referred to them—to ascertain that the business has been done, and that the charges are reasonable: not to ascertain who is the party entitled to receive the costs.

Whenever a new jurisdiction, unknown to the common law, is created by statute, the formalities prescribed in the exercise of that jurisdiction must be strictly pursued. This case is analogous to that of a conviction before a magistrate, on the face of which it must appear that the convicting magistrate has power to convict, and that the requisite proceedings preliminary to the conviction have been duly taken—1 Burn's Justice, *Conviction*, 835, et seq.; Paley on Convictions, 16; 2 Hawkins P. C., c. 25, s. 13. In Viner's Abridgment, *Authority*, (B) pl. 44, it is said: "All authorities, whether judicial or ministerial, or privately from one person to another, must be pursued; for, when one has no right to do a thing but by a derivative power, he must shew he has pursued his power; and especially, if the thing to be done be entire, and more is done than is warranted by the power, all is void." In *Regina* v. *Whistler*, 2 Salk. 542, Holt, 215, Lord Chief Justice Holt says, that, "where a statute makes that felony which was not so at common law, aiders and abettors, according to the notion of the common law, are within the statute, though not expressed; but, where an offence at common law is only made more penal, aiders and abettors are not to be understood of such as aid before and after the fact, but such as are present only: these were only accessories at common law, and are not within the act." In *Rex* v. *Chandler*, 1 Salk. 378, the same learned judge, upon a conviction of deer-stealing on the 3 & 4 W. & M. c. 10, said, "that, in these summary proceedings, the right of an Englishman of being tried per

parios suos was taken away; therefore the court was to construe them strictly, so far as to see that the fact was an offence within the act, and that the justices proceeded accordingly. In *Rex* v. *Green*, Cald. 391, Ashhurst, J., says: "The construction ought to be more strict upon convictions than upon indictments; and the reason is, because in the first case the jurisdiction is summary." In *Rex* v. *Little*, 1 Burr. 613, Lord Mansfield says: "Convictions ought to be taken strictly; and it is reasonable that they should be so, because they must be taken to be true against the defendant, and therefore ought to be construed with strictness." In *The King* v. *Jukes*, 8 T. R. 536, a statute (36 Geo. 3, c. 60, s. 2,) directed that no person should expose to sale metal buttons marked with the word *gilt* (the same not being really gilt), *knowing* the same not to be gilt, under a certain penalty; a conviction charging that the defendant did the act *unlawfully and fraudulently, contrary to the form of the statute*, was held bad, without an express charge that they did it *knowingly;* and such a defect was held not to be aided by a proviso in the statute, that "no conviction for any offence in the act should be set aside for want of form, or through the mistake of any fact, circumstance, or other matter, provided the *material* facts *alleged* were *proved;* for, this in effect requires all material facts to be *alleged;* and *knowledge* is a material fact to constitute such an offence. Lord Kenyon there said: "Though the act has prescribed the form of conviction, it is necessary that it should appear on that form of conviction that the offence created by the act has been committed."

The Speaker could not proceed ex mero motu: and it does not appear that the application to set him in motion was made by any person having authority. Hart no where appears to be Fector's agent; and, assuming that he was so, the application to the Speaker to refer his bill to taxation is not made by him: delegatus non potest delegare.

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This is not a mere technical objection: it goes to the merits. Four distinct descriptions of persons are entitled to make the application to the Speaker, viz. the petitioners, parties, witnesses, and officers. The statute intended that fair notice should be given of what the taxation is. In *Ranson* v. *Dundas*, 3 Scott, 429, 3 New Cases, 123, the application was by the petitioners proprio nomine. Where a penalty is given as a compensation to the party grieved, it must appear to be sued for by the party himself, or at his instance. Thus, in *The King* v. *Daman*, 2 B. & A. 378, it was held, that, in a conviction founded upon the 5 Geo. 3, c. 14, s. 3, it must be distinctly stated in the information and in evidence, that the proceeding was at the instance of the owner of the fishery; and therefore, where it was merely stated in the memorandum of a conviction, that the proceeding was at the instance of such owner, and where the information, without containing any such allegation, concluded with a mere prayer of judgment on behalf of such owner, and the evidence was wholly silent on the subject, the conviction was held to be bad. So, in *The King* v. *Smith*, 5 M. & S. 133, it was held that two justices may proceed under the 12 Geo. 3, c. 61, s. 18, to adjudge a forfeiture of gunpowder unlawfully conveyed, to the person seizing the same; but the conviction must shew that the person to whom it is adjudged is the person who seized, its being adjudged to T. G., the person who seized the same, without more, is insufficient.

2. The certificate includes costs to which the plaintiff is not entitled.

2. The certificate includes the costs of Benstead, an elector, who was admitted as a party to defend the return. Benstead is not bound by this certificate: there is nothing to prevent him from applying for a taxation and a certificate for his costs; and the judgment upon this certificate would be no answer to a motion to enter up judgment upon such second certificate. In *Strachey* v. *Turley*, 7 East, 507, where two several petitions, signed by different persons, were presented to the House of Commons against the re-

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turn of members to serve in parliament for East Grinstead, which petitions were referred to the same select committee for trial, who reported them both to be frivolous and vexatious; it was held that the costs could not be taxed *jointly* under the statute 28 Geo. 3, c. 52. The court said that a contrary contruction would work injustice: "for, it might happen that one person or set of persons might petition against a return upon the ground of a single fact in dispute, as that the sitting member was under age, or the like; and another set of petitioners might impeach the election upon the allegation of the bribery and corruption of a majority of the voters; which would make the greatest difference in the costs and expenses of those who opposed them: but it would be too much to contend that both sets of petitioners were equally and jointly liable to the whole costs and expenses of the defence; and yet both would be interested in disqualifying the sitting member." The converse of the proposition is equally applicable here. Benstead's costs may have been very different from those of Fector; the vexation and frivolity might operate upon them in materially different degrees.

3. The action should have been brought against all the parties declared liable by the certificate.

3. The action should have embraced all the parties named in the Speaker's certificate. By the 63rd section of the statute, it is declared that the certificate "shall have the force and effect of a warrant to confess judgment; and the court in which such action shall be commenced, shall, upon motion, and on the production of such certificate, enter up judgment in favour of the plaintiff or plaintiffs named in such certificate, for the sum specified therein to be due from the defendant or defendants in such action, in like manner as if the said defendant or defendants had signed a warrant to confess judgment in the said action to that amount." [*Tindal*, C. J.—By that section, the demand may be made upon *one* of the parties made liable to the payment, and the action may be brought against *another*.] There may be a separate report against any one of several petitioners—

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Gurney v. *Gordon*, 2 M. & Scott, 187, 9 Bing. 37, 2 C. & J. 614, 3 Tyr. 616: but the certificate is, by s. 60, to contain the name of *the party* liable to pay the costs; and it is to have "the force and effect of a warrant to confess judgment." That a warrant of attorney signed by two or more persons would not authorize the entering up a judgment against one of them, will hardly be disputed. If authority be wanted for this, it will be found in the cases of *Gee* v. *Lane*, 15 East, 592, and *Raw* v. *Alderson*, 7 Taunt. 453, 1 Moore, 145.

Preliminary observations.

Thesiger and *Channell*, in support of the rule.—Great inconvenience exists in the mode of bringing matters of this sort before the court. On moving for the rule, the only materials the plaintiff need produce, are, the certificate of the Speaker, and the subsequent proceedings. All that is anterior the defendant may import into the argument, the plaintiff having no opportunity of answering his statements on oath. Such, however, being the course, the court will at least require from the defendant the strictest good faith, and will make every intendment against him where anything material is suppressed. It has been strongly urged on the part of the defendant that the court can intend nothing in favour of the Speaker's certificate; and that, where a new jurisdiction dispensing with the common law is created, the proceedings must be conducted with the utmost strictness. In support of this position several cases have been cited. Their authority is not disputed; but their applicability to the present inquiry is denied. The jurisdiction created by the statute 9 Geo. 4, c. 22, is not that of the Speaker, but of the committee of the House of Commons: the acts done by him are only ancillary to that jurisdiction. And there is no more reason for construing this statute strictly, or considering it to be penal, than for so construing or considering the statute of Gloucester, or any of the other statutes relating to costs.

The certificate of the Speaker must be considered primâ facie evidence of the propriety of all the previous proceedings, save such as are essential to the creation of a liability in the person to be charged. The court will presume that there have been a regular and proper application to the Speaker to refer the bill of costs for taxation, a due appointment of examiners, and a formal report of the examiners so appointed: all which are preliminary to the certificate. As regards all that precedes the signing of the certificate by the Speaker, the act is merely directory. Lord Mansfield, in *Rex* v. *Loxdale*, 1 Burr. 447, says: "There is a known distinction between circumstances which are of the *essence* of a thing required to be done by an act of parliament, and clauses *merely directory*." This is a distinction that is every day acted upon. In *Bruyeres* v. *Halcomb*, 5 N. & M. 149, 3 Ad. & E. 381, the very foundation of the proceedings failed. Instead of pursuing the act of parliament, the House, notwithstanding Halcomb's non-appearance, proceeded to strike the committee. The committee, therefore, had no legal existence. The Speaker's certificate comes in aid only of a properly consituted jurisdiction. But, in *Magrane* v. *White*, 2 M. & R. 440, 8 B. & C. 412, where the Speaker of the House of Commons certified that a certain sum was due to A. B., "a witness summoned by and on behalf of C. D., one of the sitting members for Dublin, to give evidence before an election committee," the court of King's Bench ordered judgment to be entered up against C. D. for that sum as upon a warrant of attorney—the certificate being conclusive as to the fact of the witness having been summoned.

1. Statute sufficiently complied with.

1. The first objection urged on the part of the defendant, is, that the certificate is informal, inasmuch as it is no part of the Speaker's duty or authority to insert therein the name of the party entitled to the costs; and that there was no proper requisition. Coppock's affidavit sets out the letter addressed to the Speaker by Bower & Back; but

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the account which accompanied it is suppressed. No previous requisition to the Speaker is necessary, to enable him to refer a bill of costs to taxation: he may do it ex mero motu. But, if any be necessary, what sort of a requisition does the statute require, and by whom must it be made? The persons by whom, according to s. 60, the application is to be made, are, the "petitioner, party, witness, or officer;" nothing is said about the attorney or agent of the party. But, can any one doubt that an application by the agent or attorney would be a good requisition for the Speaker to act upon? In *Ranson* v. *Dundas*, 3 Scott. 429, 3 New Cases, 123, the application to the Speaker to refer the bill to be taxed was signed "Ashhurst & Gainsford;" and there was nothing on the face of the affidavits to shew that they were the agents of the petitioners. The affidavit in answer to the rule does not state that Hart was not Fector's attorney, or that Bower & Back were not his agents In the absence of evidence to the contrary, the court will presume that the Speaker had before him ample materials to satisfy him that he was bound to appoint examiners and refer the bill to them for taxation.

2 Certificate conclusive as to *amount*.

2. The next objection is, that the certificate is for one entire sum, including the costs of an elector who was admitted as a party to defend the seat, under s. 10 (63). And here again a material fact is suppressed. The insertion of Benstead's costs was not made a ground of objection before the examiners. Is it competent to the defendant

(63) Which enacts "that it shall and may be lawful, at any time within fourteen days after the day on which any such petition shall have been presented, for any person or persons claiming to have had a right to vote at the election, or at the election of delegates or commissioners for making such election, to which the same shall relate, to petition the House of Commons, praying to be admitted as a party or parties to defend such return, or to oppose the prayer of such petition, and such person or persons shall thereupon be admitted as a party or parties, together with the sitting member, and shall be considered as such to all intents and purposes whatever."

now to urge it? If such an objection be available in this form, and at this stage of the proceedings, the improper introduction of a single item in the bill will enable a party to overturn the Speaker's certificate when it may be too late to remedy the defect. Benstead, however, was not a distinct party; he is identical with the sitting member: the application might have been made either by him or by Fector. *Strachey* v. *Turley* was the case of two several petitions presented by separate parties. There may be petitions upon different grounds: one may petition on the ground of want of qualification, another on the ground of bribery, a third may pray a scrutiny. The first petition may be disposed of in a day, the second might occupy a longer space of time, the third might consume several weeks. The costs occasioned by the last would of course be very much larger than those of the other two; a joint taxation therefore in such a case would be manifestly unjust. This was the ground taken by the court in *Strachey* v. *Turley*. [*Coltman*, J.—The taxation being of the joint costs, it is difficult to perceive how an action can be maintained by one.] There can be no injustice or inconvenience in including Benstead's costs in the certificate, the petitioners being jointly liable for the whole. The result is the same. Besides, this is at the most no more than an objection to the *amount* of the costs, upon which, by section 60, the certificate of the Speaker is declared to be conclusive. In *Ranson* v. *Dundas*, 3 Scott, 495, Tindal, C. J., says: "The last ground of objection relates to the mode in which the taxation of costs is conducted. It is alleged that it included costs not strictly and properly occasioned by the opposition of the sitting members against the petition; such as costs occasioned by the charge against the returning officers, and other charges not authorized by the statute. The only question is, whether, in this stage of the proceedings, this court has any power to try the propriety of this allowance, or the principle upon which it was conducted, after the certificate thereon has

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been granted by the Speaker. And we are decidedly of opinion that we have no such authority; but that the terms of the 60th section, 'that the certificate signed by the Speaker shall be conclusive evidence of the amount of such demands in all cases and for all purposes whatsoever,' are at once so clear and so precise that we should be taking upon us a jurisdiction not granted or intended by the statute, if we interfered in any manner on the subject. It is obvious that any such interference would be altogether useless; for, if upon the discussion before us it appeared to us that any mistake was made, we have no means of rectifying it by sending the matter back to the examiners, or to any other officer; and the consequence would therefore be, that, if the smallest mistake in the amount was discovered as to a single item (as indeed was avowed in the course of the argument), the petitioners must lose the whole of their costs: a conclusion at once so unjust and unreasonable, that, if there was any doubt upon the words of the act, it would go strongly to shew that we could not have the power contended for." And there could be no impropriety in introducing Fector's name; for, there might be many persons entitled to costs.

3. Action well brought against one.

3. The Speaker has signed one joint certificate against the six petitioners, and this action is brought against one only; and it is contended, that, inasmuch as the statute declares that the Speaker's certificate shall have the force and effect of a warrant to confess judgment, all the technichal rules of practice with regard to instruments of that description are to be imported into this proceeding; and *Gee* v. *Lane*, 15 East, 592, and *Raw* v. *Alderson*, 7 Taunt. 453, 1 Moore, 145, were cited for the purpose of shewing that judgment cannot be entered up against one on a joint warrant of attorney given by two. That proposition is not disputed. This objection proceeds upon a misapprehension of the 63rd section of the statute, which provides "that it shall and may be lawful for the party or parties entitled to

such costs and expenses, or for his, her, or their executors or administrators, to demand the whole amount thereof so certified as above *from any one or more* of the persons respectively who are thereinbefore made liable to the payment thereof in the several cases thereinbefore mentioned, and in the case of nonpayment thereof to recover the same by action of debt," &c. In *Gurney* v. *Gordon*, 2 M. & Scott, 187, 9 Bing. 37, 2 C. & J. 614, 3 Tyr. 616, the Exchequer Chamber decided that the Speaker's certificate might be directed against one of several petitioners. Why, then, may not a joint certificate be made separate by the proceedings against the party? At all events, the objection can only be available when the plaintiff proceeds against the other parties.

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court:—Upon shewing cause against the rule granted in this case for signing and entering up final judgment for the sum specified in the certificate of the Speaker of the House of Commons, in pursuance of the statute 9 Geo. 4, c. 22, three objections have been urged on the part of the defendant against the plaintiff's right to recover his costs—first, that, upon the facts brought before the court by the affidavits, the Speaker had no jurisdiction to grant his certificate—secondly, that the certificate includes the costs of another petitioner besides those of the plaintiff—and lastly, that the action should have been a joint action against all the petitioners, not a several action against each.

Third point.—Action properly brought against one.

With respect to the objection lastly taken, we think it might have been entitled to much consideration, if the plaintiff had already entered up his judgment in another action against any one of the parties made liable to the costs: for, that would have raised the question whether more than one action can be maintained under the statute, where several parties are made liable to the costs: but, as

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no application has yet been made by the plaintiff in any other action, and it does not appear that any other will be made, the only question at present before us, is, whether a several action is maintainable against one of such parties only. And we think, that, upon the construction of the 63rd section, it is at all events in the election of the party who is entitled to his costs under the Speaker's certificate, to demand them of any one of the persons made liable by the certificate, and to bring his action against such one alone.

Clauses to be construed favourably.

In support of the two former objections, it has been urged, in the first place, on the part of the defendant, that the several clauses of the statute which give authority to the Speaker to ascertain and certify the costs, are to be considered as and to receive the same strict construction with clauses in an act of parliament which impose a penalty; so that no intendment is to be made in favour of the Speaker's jurisdiction; but, on the contrary, such jurisdiction must appear expressly and with entire certainty upon the face of the proceedings themselves. But we cannot consider the authority given by this statute to the Speaker as having any connection with or bearing any analogy to a penal enactment. Even admitting that the clauses which give to the committee appointed to consider the merits of a petition the power of reporting that such petition or the opposition thereto is frivolous and vexatious, and which impose as the consequence of such report the payment of the full costs and expenses of the adverse party by the persons against whom such report is made, are to be considered as in the nature of penal enactments; still the authority given to the Speaker is of a nature widely different: it is created, not for the purpose of imposing costs, but of ascertaining their amount by taxation of certain officers therein mentioned; and the clauses relating to it have no other object or effect than to moderate and diminish the amount of the costs already incurred, or at

all events to ascertain their just measure. They are in fact clauses beneficial to and not in prejudice of the party against whom the penalty of costs has been awarded under the statute: and therefore it appears to us that they ought to receive a favourable construction in themselves; and that every fair intendment is to be made from the facts disclosed by the affidavits, in support of the jurisdiction under which the Speaker acts.

First point.—Directions of the act sufficiently complied with.

Now, the first objection is, that the name of Mr. Fector, the petitioner, no where appears upon the face of any document brought before the court, until it occurs for the first time in the Speaker's certificate; but that, in the original application to the Speaker, a copy "of Mr. Hart's account against the petitioners" is transmitted for taxation; and that the reference by the Speaker to the taxing officers, the appointment given by them of the day of taxation, and also their report to the Speaker of the amount of the costs, never disclose the name of the petitioner, but use and adopt the same description as that contained in the first application. It is therefore contended by the defendant that the account of Mr. Hart is or may be the account of a perfect stranger to the transaction; that the costs and expenses may include or belong to something else; and that no authority is shewn in the Speaker to insert the name of Mr. Fector in his certificate. But, when it is considered that the taxation of the costs which took place arose out of the decision of the committee appointed to try the merits of the Maidstone election, by which it appears, as set out in one of the affidavits, that Mr. Fector was the sitting member and the party petitioned against, and that the appointment of the day for taxation is headed "Maidstone Borough," and the costs and expenses of Mr. Hart in the matter of the above election are therein expressly referred to, that the report of the examiners is headed "Maidstone Election," and that the Speaker's certificate is founded expressly on the reference which he had pre-

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viously made to these same officers, and which he describes in his certificate as a reference of "the costs and expenses incurred by John Minett Fector, Esq., sitting member for the borough of Maidstone"—it seems a necessary intendment, that, taking the documents together, the costs and expenses of Mr. Hart in the matter of the election, and the costs and expenses claimed by the sitting member, must be the same identical costs and expenses. Again, the affidavit of the defendant's agent states that he attended the taxation, that he objected to the authority of the taxing officers, and protested against their proceeding; but that nevertheless they proceeded: and, though the affidavit is silent as to what objection was made, yet, taking it to have been that which is above adverted to, it could only have been overruled by proof before the officers that the costs of Mr. Hart and the costs of Mr. Fector were identically the same. Indeed, there is not the slightest suggestion in the affidavit that Mr. Hart's bill of costs related to any other subject-matter than the costs incurred before the Maidstone election committee; and such suggestion could never have been omitted if the fact had warranted the insertion of it. We therefore think the first objection ought not to be allowed to prevail.

Second point.—Certificate conclusive as to amount.

The second objection is, that the costs of Benstead, an elector, who was allowed by the House to be admitted a party to defend the return of Mr. Fector, are included in the amount of the taxation, and that the Speaker had no jurisdiction to make a certificate including both. What was the amount of those costs so alleged to be due to Benstead, the affidavit does not disclose, nor the ground upon which the taxing officers included such costs in the bill; nor, indeed, does it appear with any degree of certainty that the agent made any precise objection on this account. But, whether he did or not, we think this objection is answered by reference to the 60th section of the statute, by which the certificate of the Speaker is declared to be con-

clusive evidence of the amount of the costs; the disputed items being in effect items in the account, which the taxing officers, after hearing both sides, thought themselves warranted in allowing, and the Speaker in certifying. And we think the present case differs widely from that of *Strachey* v. *Turley*, 7 East, 507, where the objection that the costs of two separate parties were made the subject of a joint taxation, appeared upon the documents themselves; and the court could not do otherwise than take notice, that, under a power given to tax the costs of "such petition," the officers had taxed the costs jointly of two several petitions signed by different persons: whereas, in the present case, the objection is raised only by affidavit.

We therefore think the objections ought not to be allowed, and that the rule for entering up judgment should be made absolute.

Rule absolute.

POCOCK *v.* SHELL.

Thursday, Jan. 31st.

ON the 28th November last, the defendant delivered a demurrer to the declaration in this case. The plaintiff thereupon took out a summons to amend, on payment of costs. On attending the taxation, it was discovered that the demurrer was not properly signed by counsel; and the plaintiff signed judgment for want of a plea. The proceedings, however, were stayed by Bosanquet, J., until the *second* day of this term, in order to give the defendant an opportunity of moving to set aside the judgment.

The declaration being demurred to for a substantial defect, the plaintiff obtained an order to amend on payment of costs. On attending the taxation, it was discovered that the demurrer was not signed by counsel, whereupon the plaintiff signed judgment for want of a plea: —The court set aside the judgment on payment of costs— the plaintiff having leave to amend on payment of costs.

Wilde, Serjeant, on the *seventh* day of the term, obtained a rule nisi.

Humfrey now shewed cause.—The plaintiff was not precluded by the order for the amendment from signing

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judgment for want of a demurrer, the moment he had the means of ascertaining that the demurrer was a nullity, which by reason of the want of a proper signature by counsel it clearly was—*Macher* v. *Billing*, 3 Dowl. 246. And the motion was made too late.

Wilde, Serjeant, in support of the rule.—It was not competent to the plaintiff, after having obtained a judge's order for setting aside the demurrer, to sign judgment in the manner he has done. This is not the case of a mere irregularity; but the objection is one that would be available on a writ of error: and therefore the defendant is not tied to any particular time for applying to the court.

PER CURIAM.—The plaintiff cannot be said to be in fault for not signing judgment before he had the means of informing himself of the defect. The defendant is in some degree to blame for not having come earlier. It seems to us that the justice of the case will be met by making this rule absolute on payment of costs—the plaintiff to be at liberty to amend his declaration also on payment of costs of the amendment.

Rule absolute accordingly.

Thursday, Jan. 31st.

RAWLINGS *v.* SEWELL and TURNER.

In trespass against two defendants, the plaintiff obtained a verdict against one, and the other was acquitted. The court made absolute *without costs* a rule for setting off the costs of the successful defendant against the damages and costs awarded for the plaintiff against the other defendant—disregarding the attorney's lien.

THIS was an action of trespass. The jury found a verdict against Turner, and acquitted Sewell.

Bompas, Serjeant, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why the Master on taxation should not set off against the damages and costs awarded against Turner, the costs due to Sewell. The rule was granted upon the authority of *George* v. *El-*

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ston, 1 Scott, 518, 1 New Cases, 513, and *Lees* v. *Reffitt*, 3 Ad. & E. 707, 5 N. & M. 340.

Theobald, contrà, submitted that the application to the court was unnecessary, for that the Master would have allowed the set-off as a matter of course, the point having been settled ever since the case of *Schoole* v. *Noble*, 1 H. Blac. 23: and he distinguished this case from *George* v. *Elston*, inasmuch as there the rule sought also to set off costs of a former action which had been nonprossed—see 1 Scott, 520, n. (*b*).

Bompas, in support of the rule, relied upon the cases before cited, and also upon that of *Pocock* v. *O'Shaunessy*, 6 Ad. & E. 107, to shew that the application was properly made to the court.

PER CURIAM.—There seems to be sufficient authority for coming here. The rule must be made absolute without costs.

Rule absolute accordingly (65).

(65) See Gambrell v. The Earl of Falmouth, 6 N. & M. 859.

GIBSON *v.* LORD RANELAGH.

Thursday, Jan. 26th.

Service of a rule to compute where the defendant is abroad and has no place of residence in this country, and no attorney acting for him in the suit.

BARSTOW, upon an affidavit that the defendant was abroad, and had no place of residence in this country, and no attorney acting for him in the particular suit, moved that service of a rule to compute upon the general attornies of his lordship, and sticking up a copy in the Master's office, should be deemed good service.

THE COURT granted a rule nisi, which was afterwards made absolute, no cause being shewn; and directed that the rule absolute should be served in the same way.

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The court permitted one of two defendants to plead his bankruptcy and certificate, without the affidavit required by the rule of Hilary Term, 4 Will. 4, that the matter thereof arose within eight days before the pleading of such plea; it appearing that the defendants had had reason to believe that the action would not be proceeded with: and this, though it did not appear whether or not the demand was provable under the fiat.

KIBELEWHITE v. REYNOLDS and GREEN.

BY Reg. Gen. Hilary Term, 4 Will. 4, First Rules and Regulations, 2, it is provided, "that, in all cases in which a plea of puis darrein continuance is now by law pleadable in banc or at Nisi Prius, the same defence may be pleaded, with an allegation that the matter arose after the last pleading, or the issuing of the jury process, as the case may be: provided also, that no such plea shall be allowed, unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such pleas, or unless the court or a judge shall otherwise order."

Upon an affidavit by the defendant Green, that the action was brought to recover damages for breaches of the covenants contained in a lease (in consequence of which the plaintiff had been ejected by the superior landlord); that an appearance was entered for both the defendants on the 24th May, 1837; that on the 26th, a declaration was delivered to the defendant Green, who on the 23rd June pleaded for both defendants, and paid into court 1*s.* in satisfaction of the damages; that the defendant Reynolds was declared bankrupt on or about the 14th May, 1838, and obtained his certificate in the October following; that no further step had been taken in the action until the 9th January instant, when the deponent received from the plaintiff's attornies notice of his intention to proceed; that, in consequence of the length of time that had elapsed without any proceedings being taken, the deponent concluded and believed that the plaintiff did not intend further to prosecute the action; and that he had reason to believe that the plaintiff's attornies were cognizant of Reynolds's bankruptcy—

Knowles obtained a rule calling upon the plaintiff to

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shew cause why Reynolds should not be at liberty to plead his bankruptcy and certificate in bar of the further maintenance of the action against him, without an affidavit that the matter of the plea arose within eight days of the pleading thereof.

W. H. Watson now shewed cause. – The court will not except this case out of the operation of the general rule unless they are satisfied that the proposed plea can properly be pleaded: and the affidavit upon which the rule was obtained does not shew that the demand is one that is provable under the fiat.

TINDAL, C. J.—We cannot refuse what is prayed unless it is made to appear that the proposed plea is clearly bad.

The rest of the court concurring—

Rule absolute, on payment of costs.

BAXTER and Another *v.* HOZIER.

Thursday, Jan. 31*st.*

A plea to an action of account by a merchant against his partner, charging him as tenant in common and bailiff, that, before the commencement of the action, and after the selling and disposing of the goods and merchandizes in the declaration mentioned, the defendant did render to the plaintiff a reasonable account of the said goods and merchandizes, and of the proceeds and profits thereof, is in substance a plea of plenè computavit.

To satisfy such a plea the defendant must prove an account rendered shewing *an agreed balance* between the plaintiff and defendant: an account in which the defendant charges himself as factor for the whole, instead of charging himself as factor for one moiety and as owner of the other, thereby making himself liable to a moiety of the losses arising from the sale of the whole, is insufficient.

THE following case was submitted for the opinion of this court: —

This was an action of account brought by the plaintiffs as the surviving partners of John Collier and John Baxter, deceased. The declaration stated, that, on the 9th October, 1837, the plaintiffs, together with John Collier and

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John Baxter since deceased, and the defendant, were the owners of divers goods and chattels, to wit, fifteen cases of linens called plaids, containing 10,870 yards of the said linens, of great value, to wit, of the value of 300*l.*, as tenants in common thereof; which goods and chattels so being the property of the plaintiffs and the said John Collier and John Baxter and the defendant, were in the care and management of the defendant, and were held by him as the owner of the one undivided moiety thereof, and as the bailiff of the plaintiffs and John Collier and John Baxter of the other undivided moiety, to be merchandized and made profit of for the plaintiffs and John Collier and John Baxter, or the survivors of them, and the defendant, according to their respective interests: and the defendant was thereupon to render a reasonable account thereof to the plaintiffs and John Collier and John Baxter, or the survivors of them, when he should be thereto requested: but, although the defendant afterwards, to wit, on &c., in the lifetime of John Collier and John Baxter, sold and disposed of the same for and on account of the defendant and the plaintiffs, and of John Collier and John Baxter; and although the plaintiffs and John Collier and John Baxter, in their lifetime, afterwards, to wit, on &c., requested the defendant to render a reasonable account of the said goods and merchandizes, and of the proceeds and profits thereof: and the defendant was afterwards, and after the death of John Collier and John Baxter, to wit, on &c., requested by the plaintiffs so to do, yet the defendant had not rendered the said reasonable account of the said goods and merchandizes, or of the proceeds and profits thereof, either to the plaintiffs and John Collier and John Baxter, or any of them, in the lifetime of John Collier and John Baxter, or to the plaintiffs or either of them since the death of John Collier and John Baxter; but had hitherto wholly neglected and refused so to do, contrary to the form of the statute in such case made and provided.

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There was a second count, in the same form, upon another consignment; and other two counts for other and different consignments: upon the last two counts the defendant suffered judgment by default.

As to the first two counts, the defendant pleaded—first, that the plaintiffs, together with John Collier and John Baxter, deceased, and the defendant, were never owners of the goods and chattels in those counts mentioned, or of any part thereof, in manner and form as the plaintiffs had alleged—secondly, that the said goods and chattels in those counts mentioned were not nor was any part of those goods and chattels ever in the care and management of or held by him, the defendant, as the owner of the one undivided moiety thereof, and as the bailiff of the plaintiffs and John Collier and John Baxter deceased, of the other undivided moiety thereof, in manner and form as the plaintiffs had alleged—thirdly, that he did not sell or dispose of the said goods and chattels in those counts mentioned, or any part thereof, in manner and form as was alleged in the said two first counts—fourthly, that, long before the commencement of this action, and after the said selling and disposing of the goods and chattels in those counts respectively mentioned, and in the lifetime of John Collier and John Baxter deceased, the defendant did render to the plaintiffs and John Collier and John Baxter, deceased, a reasonable account of the said goods and merchandizes in those counts mentioned, and of the proceeds and profits thereof—fifthly, a similar account rendered to the plaintiffs before the commencement of the action.

First plea.

Second plea.

Third plea.

Fourth plea.

Fifth plea.

At the trial of the cause a verdict was entered for the plaintiffs on all the issues, subject to the award of a barrister, who was by the order of reference impowered to direct that a verdict should be entered for the plaintiffs or the defendant, and such judgment thereon for either of the parties as he should think proper; and to whom the cause and all matters in difference between the parties

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were thereby referred; and who was to raise upon the face of his award any point or points of law, if any should occur, for the opinion of the court.

Finding upon the first issue.

The arbitrator found, upon the first issue, that the plaintiffs, with John Collier and John Baxter, both deceased, and the defendant, were owners of the said goods and chattels in the first and second counts of the declaration mentioned, in manner and form following; that is to say, the plaintiffs, together with the said John Collier and John Baxter, were, during the time that the said goods and chattels were in the care and management of the defendant, joint owners of one undivided moiety of the said goods and chattels, and, as such joint owners of the said undivided moiety, were, during all the time aforesaid, tenants in common with the defendant and one George Atkinson of the said goods and chattels; the defendant and the said George Atkinson then being joint owners of another undivided moiety of the said goods and chattels: and awarded, that, unless the court should otherwise order, a verdict should be entered for the plaintiffs on the said first issue.

Finding upon the second issue.

Upon the second issue—that the goods and chattels in the said first and second counts mentioned were in the care and management of and held by the defendant as the owner jointly with the said George Atkinson of the one undivided moiety thereof, and as the bailiff, jointly with the said George Atkinson, of the plaintiffs and the said John Collier and John Baxter deceased, of the other undivided moiety thereof: and awarded, that, unless the court should otherwise order, a verdict should be entered for the plaintiffs upon the said second issue.

Finding upon the third issue.

Upon the third issue—that the defendant did sell and dispose of the said goods and chattels in the first and second counts mentioned in manner and form following; that is to say, for and on account of the defendant and the said George Atkinson as to one undivided moiety thereof, and for and on account of the plaintiffs and the said John

Collier and John Baxter as to another undivided moiety thereof: and awarded, that, unless the court should otherwise order, a verdict should be entered for the plaintiffs upon the said third issue.

Finding upon the fourth issue.

Upon the fourth issue—that the said goods and chattels in the first and second counts mentioned were manufactured by the plaintiffs and by the said John Collier and John Baxter in Scotland, and were afterwards forwarded by them to the defendant and the said George Atkinson, in Jamaica, to be sold by the defendant and the said George Atkinson on the joint account of the plaintiffs and the said John Collier and John Baxter, and of the defendant and the said George Atkinson, in such proportions as thereinbefore found and stated with reference to the third issue, and were then by the defendant and the said George Atkinson accepted, to be by them there sold on such joint account and in such proportions as aforesaid; that, afterwards, and before the commencement of this suit, and after such selling and disposing of the said goods and chattels in the said first and second counts respectively mentioned as thereinbefore found with reference to the said third issue, and in the lifetime of the said John Collier and John Baxter, the defendant did render to the plaintiffs and the said John Collier and John Baxter deceased a certain account as and for a reasonable account of the said goods and chattels in those counts mentioned, and of the proceeds and profits thereof, which account contained a statement of the prices obtained by the defendant upon the sale of the said last-mentioned goods and chattels, and also an account of the charges upon such goods and chattels, made out by the defendant in the ordinary form of accounts of sales rendered by a factor to whom goods are consigned for sale, to his principal, the consignor, taking credit for the whole of the charges incident to the sale of the said goods and chattels, including a commission of 10 per cent. upon such sales, without noticing any interest of the de-

Account rendered.

[illegible] ... [illegible] ... [illegible] ... [

the said parties as well in respect of the matters contained in the first and second counts, as also in respect of the matters contained in the third and fourth counts of the declaration, awarded that final judgment should be entered for the plaintiffs as upon an account taken by an auditor appointed by the court, by and with the consent of the respective parties, for certain sums specified, or for any less amount to which the court might see fit to order the judgment to be reduced by the disallowance of any of the said sums either in the whole or in part.

Interest.

He also found that the transactions in respect of which the causes of action in the first and second counts arose, took place in the West Indies, where, during the period of those transactions, and thence hitherto, the defendant and George Atkinson carried on the business of merchants in copartnership; that, by the course of dealing between the plaintiffs and John Collier and John Baxter and the defendant and George Atkinson, before and during the period of those transactions, interest at the rate of 6 per cent. per annum was charged and allowed in account upon the amounts and balances due from one of the parties to the others of them respectively; and that, at the commencement of this action, the defendant was indebted to the plaintiffs in the sum of 19*l.* 12*s.* 7*d.* for interest upon 95*l.* at the rate of 6 per cent per annum.

Questions.

The questions for the opinion of the court were—first, whether verdicts should be entered up for the plaintiffs on all the issues, and a judgment quod computet be entered against the defendant thereon, in manner directed by the arbitrator; or whether a verdict should be entered for the defendant upon all or some and which of the issues—secondly, whether final judgment should or should not be entered for the plaintiffs, as directed by the arbitrator, in respect of all or some and which of the counts in the declaration.

The case was argued in Michaelmas Term last.

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W. H. Watson, for the plaintiffs.—The action of account though not a very common action, is one that nevertheless might often be very profitably had recourse to. The arbitrator finds that the defendant was both tenant in common with the plaintiffs, and bailiff: therefore the action is maintainable against him as well at common law as under the statute 4 & 5 Anne, c. 16, s. 27—*Wheeler* v. *Horne*, Willes, 208, 14 Viner's Abridgment, 513, 514, Comyns's Digest, *Accompt*, (B); Bacon's Abridgment, *Accompt*, (A); Viner's Abridgment, *Account*, (C), (D), (F). The circumstance of Atkinson, the defendant's partner, not being made a co-defendant, is not now ground of objection. The action of account is founded on a contract, and is governed by all the rules that regulate actions ex contractû; and it is clear, that, in all actions upon contracts, the omission of the name of a joint contractor can only be taken advantage of by plea in abatement—*Mountstephen* v. *Brooke*, 1 B. & A. 224: *Abbott* v. *Smith*, 2 W. Blac. 947. In 1 Wms. Saund. 291 *b*, n. (4), the result of the authorities is thus stated: "Generally speaking all joint obligors or contractors ought to be made defendants, and the plaintiff may be compelled to join them all, if advantage be taken of the omission in due time and by a proper plea. In this restrictive sense is to be understood the rule which is laid down in general terms, that the plaintiff *must* join *all* the parties as defendants; for, it seems to be now settled, that, in all cases of a joint obligation or deed, or a joint contract, in writing or by parol, or ex quasi contractu, if one only be sued, *he must plead the matter in abatement*, and cannot take advantage of it afterwards upon any other plea, or in arrest of judgment, or give it in evidence." That non-joinder of a co-receiver in an action of account is ground for a plea in abatement, appears from Comyns's Digest, *Abatement*, (F. 8.); and in *Andrews* v. *Thornton*, Lill. Ent. 12, is a precedent of such a plea. A judgment against Hozier in the present case would bar an action

Non-joinder of defendant's partner.

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against Atkinson. For this there is authority:—"If two are joint bailiffs, the receipt of one is the receipt of the other; and if one dies the other shall be charged of all, and a discharge to one is a discharge to both; and if one accounts after the process determined against the other, and is charged upon the account, this shall charge the other when he comes"—Viner's Abridgment, *Account*, (K. 2), pl. 1. In *Goore* v. *Dawbeny*, 2 Leon. 76, Tanfield, arguendo, seems to put the very case now before the court. He says: "That the one joint factor may accompt without his companion, is the law of merchants; for, factors are oftentimes dispersed, so as they cannot be both present at their accompts; and so it hath been heretofore admitted in the King's Bench."

The defendant contends that the only account he is bound to render, is, an account as consignee, charging commission: but he has a joint interest, and therefore must take a share of the loss. He is bound to render such an account for which an insimul computasset would lie.

Interest.

The account is to be taken according to the course of business in the West Indies; and consequently will bear interest according to the accustomed rate there. *Harvey* v. *Archbold*, 5 D. & R. 500, 3 B. & C. 626, R. & M. 184.

Writ of account at common law.

Robinson (*Bompas*, Serjeant, was with him), for the defendant.—At common law, the writ of account lay only in three cases—1. by and against a guardian in socage—2. against a bailiff—3. against a receiver. In the Year Book, 2 H. 4, 12. b., it is said: "Nul home serr̃ tenus d'accompter, sinon per fait del ley, ou per son fait demesne: per fait del ley, come gardeine en socage, quel le ley chase et compel d'accompter: de son fait demesne, lou il est de son propre volunt receiver ou baily &c. Mes icy de faire un home d'accompter, lou il ne fuit unques son volunt d'accompter, ceo serroit marveilous chose." In Co. Litt.

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172. a., Lord Coke says: "There be but three kinds of writs of account, viz. against one as guardian, whereof Littleton hath spoken before in the chapter of Socage; the second against one as a baylife; and the third as receiver, as here it appeareth. For, a man shall not be charged in an account as surveyor, controller, apprentice, reve, or heyward. And to maintaine an action of account, there must be either a privity in deed by the consent of the partie, for against a disseisor or other wrongdoer no account doth lie: or a privity in law ex provisione legis made by the law, as against a guardian, &c., whereof sufficient hath been spoken in the chapter of Socage." So, in 2 Inst. 379—"Every writ of account must be brought against one either as bailife, receiver, or guardian in socage; and therefore against a servant as servant, or against an apprentice, or a controller, messenger, or the like, a writ of account lyeth not, unlesse he be charged as bailife or receiver."

Tenants in common or joint-tenants.

It has been said that account lies by one tenant in common or joint-tenant against another. But the authorities as to whether it would or would not lie at common law, are conflicting. In the Year Book, 11 H. 4, 79. a., it is said: "Si ii marchāts out biēs en commō, l'un n'aver̄ my acc̄ vs. l'aut." Willes, C. J., in *Wheeler* v. *Horne*, Willes, 208, says: "An action of account would not lie by one tenant in common against another as his bailiff at common law, unless he were so particularly appointed. It was so expressly said in Co. Litt. 172. a.; and there is no case to the contrary." "Though an action of account therefore may be brought by one tenant in common against another since this statute [4 & 5 Anne, c. 16], yet it is an action of a very different nature from an action of account against a bailiff at common law: first, because a bailiff at common law is answerable not only for his actual receipts, but for what he might have made of the lands without his wilful default, as is expressly held in Co. Litt. 172. a., and in many other books; but by the plain words of the statute a tenant in

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common, when sued as bailiff, is answerable only for so much as he has actually received more than his just share and proportion: Secondly, because the auditors in an action of account at common law could not administer an oath unless in one or two particular cases; but by the statute the auditors may examine the parties on oath. Now, as the judgment in both actions must be in general quod computet, how can the auditors tell in what manner he is to account, or whether they are to examine on oath or not, unless it appear by the record in what capacity he is sued, and what sort of action this is?" In Fitzherbert's Nat. Brev. 118. J., it is said: "If two have a ward, and one take all the profits, the other shall have an account against him:" "Viz. where he was his bailiff," is added in a note, citing 21 Ed. 3, 60, Account, 66; 14 Ed. 3, Account, 70; 30 Ed. 1, Account, 127; 31 Ed. 1, Account, 126. In Co. Litt. 200. b., it is laid down, that, "If one jointenant or tenant in common of land maketh his companion his baylife of his part, he shall have an action of account against him, as hath been said. But, although one tenant in common or jointenant without being made baylife take the whole profits, no action of account lieth against him; for, in an action of account, he must charge him either as guardian, baylife, or receiver, as hath been said before, which he cannot do in this case, unlesse his companion constitute him his bailife. And therefore all those books which affirm that an action of account lieth by one tenant in common or jointenant against another, must be intended when one maketh the other his bailife, for otherwise never his bailife to render an account is a good plea."

Partners in trade.

The writ of account also lies, in favour of trade between partners—Fitz. Nat. Brev. 118 D. "In some case in an action of account against one as receptor denariorum, he shall have allowance of his expenses and charges, and also shall account for the profit he received or might reasonably receive; and this was provided by law in favour of mer-

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chants, and for advancement of trade and trafficke. As, if two joynt merchants occupy their stocke goods and merchandizes in common to their common profit, one of them naming himself a merchant shall have an account against the other naming him a merchant, and shall charge him as receptor denariorum ipsius B. ex quâcunque causâ et contractu ad communem utilitatem ipsorum A. et B. provenien', sicut per legem mercatorium rationabiliter monstrare poterit." Co Litt. 172. a. In Bacon's Abridgment, *Accompt*, (A), it is said: "By the common law, accompt lay only against a guardian in socage (66), bailiff, or receiver, or by one, in favour of trade and commerce, naming himself merchant, against another, naming him merchant, and for the executors of a merchant; for, between these there was such a privity that the law presumed them conusant of each other's disbursements, receipts, and acquittances. The statute 13 Edw. 1, c. 23, gives an action of accompt to executors: the 25 Edw. 3, st. 5, c. 5, to executors of executors; the 31 Edw. 3, c. 11, to administrators; and by the statute of 4 Anne, c. 16, s. 27, actions of accompt may be brought against the executors and administrators of every guardian, bailiff, and receiver, and by one jointenant, tenant in common, his executors and administrators, against the other as bailiff for receiving more than his share, and against his executors and adminstrators."

If it be alleged that the defendant might have sold the goods for a larger price, that may render him liable to an action for breach of duty. Year Book, 20 Hen. 6, 2. Rol. Abr. *Accompt*, O, 20, 21. Co. Litt. 172. a. Brownlow, 25, n. The loss here arose from the circumstance of the goods

(66) The statute of Marlebridge, 52 Hen. 3, c. 17, is usually recited in the writ, as if the writ were warranted by that statute only. Mayn. 487. Fitz Nat. Brev. 118 A. But accompt lay against the guardian in socage at common law, and the statute was merely in affirmance or declaration of it. Co. Litt. 89. Hughs v. Harrys, Cro. Car. 229. And see Com. Dig. Accompt, (E. 2.).

going to a bad market. Is a bailiff bound to give an account of losses? He clearly is not answerable for anything that is not within his own knowledge. Co. Litt. 90. b. "This action," says Blackstone, 3 Com. 163, "by the old common law, lay only against the parties themselves, and not their executors; because matters of account *rested solely in their own knowledge.*" And it does not appear here that the defendant was informed of the invoice price of the goods; nor, if he were, would that be any criterion of their value, the plaintiffs being the manufacturers of them. It seems to be a good answer to an action of account against a bailiff, that the goods were cast overboard to save the ship—Year Book, 41 Ed. 3, 3. b.; that they were taken by pirates—Owen, 57; Rol. Abr. 124; or that they were lost by fire or robbery—*Anonymous*, 2 Mod. 100; Co. Litt. 89. a.; *Vere* v. *Smith*, 2 Lev. 5; *Parkins* v. *Woollaston*, 6 Mod. 139: but not that they were sold on credit, for a bailiff can only sell for ready money, unless by special authority—*Anonymous*, 2 Mod. 100.

The true principle upon which the action of account lies between merchants, is, as was said by Gibbs, C. J., in *Tomkins* v. *Willshear*, 5 Taunt. 431, "where the plaintiff wants an account, and cannot give evidence of his right without it." The only account the plaintiff in this case is entitled to demand from the defendant as bailiff, in which character alone the writ lies against him, is such an account as he has already rendered—an account of the proceeds of the shipment, and of his charges as factor, which are found to be the usual charges. And, though a receiver is not entitled to commission, a bailiff is—Bro. Abr. *Accompt*, pl. 53; *Suffolk* v. *Floyd*, 2 Rol. Rep. 87; Viner's Abridgment, *Account*, (H.), 3; Co. Litt. 172. a. That an account may be sufficient, though an insimul computasset cannot be brought upon it, appears from *Vere* v. *Smith*, 2 Lev. 5.

This is not a writ under the statute 4 & 5 Anne, c. 16, s. 27, the words of which are, that, from and after &c., Under the statute 4 & 5 Ann. c. 16, s. 27.

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actions of account may be brought and maintained by one joint-tenant or tenant in common against the other, as bailiff, *for receiving more than comes to his just share or proportion.* In an action on the statute, the plaintiff must state in his declaration that he and the defendant are tenants in common, and that the defendant has received more than his share—*Wheeler* v. *Horne,* Willes, 208, 14 Vin. Abr. 513, 514.

As to the nonjoinder of defendant's partner.

It may be conceded, for the authorities upon the subject are clear, that the nonjoinder of Atkinson, the partner of the defendant, could only be taken advantage of by plea in abatement.

As to the interest.

The arbitrator has drawn a wrong conclusion with regard to the interest. The contract arises in England, and is to be performed in England. The case therefore differs from *Harvey* v. *Archbold,* 5 D. & R. 500, 3 B. & C. 626, R. & M. 184, where the money was advanced at Gibraltar. If entitled to interest at all here, the plaintiff can only have it at the English rate. In *Scott* v. *Bevan,* 2 B. & Ad. 78, which was an action brought in this country to recover the value of a given sum Jamaica currency, upon a judgment obtained in that island, it was held that the value was that sum in sterling money which the currency would have produced according to the actual rate of exchange between Jamaica and England at the date of the judgment. In no case has it ever been decided that a bailiff is liable for interest.

W. H. Watson, in reply.—The arbitrator in this case has found that the parties were tenants in common of the goods, and that the defendant was bailiff, that is, of a moiety. That he is therefore liable in this form of action, is clear from the authorities that have been already with so much industry presented to the court. Merchants in partnership are tenants in common of their merchandize; and tenants in common of merchandize are partners.—

The account delivered is clearly insufficient: it excludes the defendant's liability to a moiety of the charges. In *Bovill* v. *Hammond*, 9 D. & R. 186, 6 B. & C. 149, three ship-brokers agreed in writing with a ship-owner to freight his vessel at a certain commission, dividing profits of commission. One of the brokers alone paid and received money on account of the ship, and delivered to the owners an account charging a liquidated sum for commission. The owner acquiesced in the accuracy of the account, but objected to the charge for commission being too much, but which the broker retained in his hands. There was no adjustment of accounts between the brokers. It was held that money had and received would not lie by the two brokers against the third, for their share of the commission.—The whole transaction having taken place in the West Indies, the plaintiffs are clearly entitled to the West Indian rate of interest. *Harvey* v. *Archbold* goes the whole length of deciding that.

Cur. adv. vult.

TINDAL, C.J., now delivered the judgment of the court:—The first question referred to us upon the award made in this case, is, whether the verdict shall be entered upon all the issues for the plaintiffs, or upon any, and which of them, for the defendant. The second is, whether final judgment shall be entered for the plaintiffs in respect of all or which of the counts in the declaration, and, if so, for what sum or sums.

As to the first question, the only issues upon which any doubt can arise as to the party in whose favour the verdict ought to be entered, are, the issues raised upon the fourth and fifth pleas: on all the other issues, the plaintiffs are, upon the facts found in the award, clearly entitled to the verdict. The issues in question arise upon traverses taken to the fourth and fifth pleas, which virtually involve the same inquiry, namely, whether before the action was brought the defendant did render to the plaintiffs *a reasonable ac-*

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count of the goods and merchandizes in the first and second counts mentioned, and of the proceeds and profits thereof. And, in order to determine in favour of which of the two parties this issue ought to be found, it will be necessary in the first place to ascertain the precise legal meaning of the traverse itself.

As to the form of the plea.

The plea, although in form the traverse of an allegation in the count, cannot be distinguished in its legal construction and operation from the plea well known and established in law as a bar to an action of account, viz. "that the defendant hath fully accounted with the plaintiff himself." It is a good plea in an action of account, as laid down in Fitzherbert's Natura Brevium, 117 D, n. (*d*), that the defendant has accounted before auditors assigned by the plaintiff; or that he has accounted before to the plaintiff himself: and the reason given is, that, after such account made, the action of account is gone, and the plaintiff may have an action of debt on the arrear or balance of the account. See also Bro. Abr. *Accompt*, pl. 28, 67. And, again, it is laid down in *Godfrey* v. *Saunders*, 3 Wils. 113, that "where the party is once chargeable or accountable, he cannot plead in bar, except in case of a release or plenè computavit, but must go before auditors: these exceptions are, because a release and having fully accounted are total extinctions of the right of action." From which authorities the inference is, that, unless the plea amounts to a plea of plenè computavit, inasmuch as it admits that the defendant is chargeable and accountable, there must be a judgment quòd computet.

What account will satisfy a plea of plené computavit.

The question, therefore, necessarily arises, what is such an accounting with the plaintiff as will satisfy this plea? And we think the accounting which is necessary to satisfy this allegation may be inferred from the passage in Fitzherbert already cited, and the authorities there referred to from the Year Books—7 Hen. 4, 14, and 34 Hen. 6, 43—to be *the rendering an account to the satisfaction of the*

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plaintiff, or an account which shews *an agreed balance between the plaintiff and the defendant*; for, nothing short of this would be sufficient to alter the nature of the demand, and to give the plaintiff an action of debt for the arrears or balance. And, again, in the case in the Year Books last referred to, where the plea was that the defendant, "after the receipt of the monies, and before the writ purchased, himself accounted together with the plaintiff of the same monies;" and it was objected that the plea was bad, because a man cannot be judge in his own cause: the answer given was, "that, by mutual consent, he may." And, indeed, it is obvious, that, if the mere fact of rendering a true account to the plaintiff, though not agreed to by him, were sufficient to bar the action, a defendant, by pleading plenè computavit, might always defeat the object of the action of account, which is, to obtain an investigation before auditors, and might insist that the truth of the whole account rendered was a question to be decided before the jury at Nisi Prius.

And, still further, as the plea of accounting before the plaintiff himself is put upon the same footing as an accounting before auditors appointed by the plaintiff, and it is clear that the defendant in the latter case must account to their satisfaction, we hold ourselves warranted in saying that the plea put in by the defendant on this occasion, that he has rendered to the plaintiffs a reasonable account, is not made out in his favour, unless he can shew that the account so rendered was one of that description, that the result was a balance ascertained and agreed upon between the parties. Now, upon the evidence before the arbitrator, it is manifest that the account rendered by the defendant was not an account to which the plaintiffs ever agreed: but, on the contrary, that, whilst the defendant rendered an account in which he charged himself as factor for the whole, the plaintiffs insisted that he ought to render an account in which he should be chargeable as a factor for one moiety only, and as owner of the other, and thereby make himself

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liable to a moiety of the losses arising from the sale of the whole. It appears therefore to us that the issue upon the fourth and fifth pleas must be found for the plaintiffs, and that they are entitled to judgment against the defendant "quòd computet" generally, upon the whole declaration.

As to the amount of the verdict.

The remaining question referred to us, is, upon what counts in the declaration the plaintiffs are entitled to final judgment, and for what sum. And, upon this latter question, we think, that, although difficulties might have arisen as to the mode of taking the account, resulting from the form of the declaration, and the character in which the defendant stands charged thereby, in case the account had been taken before auditors assigned by the court under the judgment quòd computet, yet, under the powers given to the arbitrator by consent of the parties, such difficulties are removed; and that it was intended by the order of the court, and the consent of the parties, that, when the arbitrator, after hearing the evidence, decided that the defendant should account, he, the arbitrator, should take the account between the parties as it really stood and ought to be taken between them, with reference to their real and true relation to each other; in short, that he was to sit as an arbitrator to whom all matters in difference between the parties were referred, and not simply as an auditor assigned under the common law judgment quòd computet, notwithstanding the judgment was ultimately to be entered up in the action. And in this view we think the account has been rightly taken by the arbitrator, and that the judgment should be entered upon the first and second counts, which were traversed, for the aggregate sums found by him to be due thereon for principal, and interest at 6 per cent.; and upon the fourth and fifth counts, on which judgment went by default, for the aggregate of the principal sum and interest at the rate above mentioned, as stated by the arbitrator. And we give judgment accordingly.

Judgment for the plaintiffs.

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Thursday, Jan. 31st.

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A WRIT of summons issued against the defendant in this case on the 5th April, 1837; an alias summons issued on the 1st September, 1837; a pluries summons on the 29th January, 1838; and an alias pluries summons on the 27th June, 1838: the plaintiff's object being to bar the statute of limitations.

The action was brought to recover the amount of several promissory notes of which the defendant was the maker, and which bore date in 1833. The writ of summons described the defendant as of 53, Russell Square, the place where the defendant resided at the time the notes were given, and to which they were addressed.

The original summons was returned and filed on the 1st September, 1837; the alias, on the 30th January, 1838 (according to the affidavits filed on the part of the plaintiff; according to the defendant's statement, on the 6th February); and the pluries, on the 27th June, 1838.

On the 31st January, 1838, the plaintiff obtained a rule for a distringas, which was issued on the 1st March, and returned nulla bona and filed of record on the 1st May.

1. The place inserted in writs of summons as that of the supposed residence of the defendant, agreeing with the place at which the promissory notes upon which the action was brought were dated, and where the defendant at that time resided:—Held, a sufficient description; though it was sworn that she had ceased to reside there six years ago—no other place of her residence being brought home to the actual knowledge of the plaintiff before the issuing of the writs.

2. *Quære*, whether an alias pluries writ of summons can issue in continuation of the alias, before the last-mentioned writ is returned and filed of record?

3. A plaintiff's right to continue writs of summons by alias and pluries, and to issue writs of distringas thereupon by leave of the court or a judge, is not, it seems, confined to the period during which the summons is in force. But, *quære*, whether they can issue after the expiration of *five* months from the teste of the preceding writs?

4. An alias pluries writ of summons was sued out after the plaintiff had, under the authority of a rule of court, issued a distringas for the purpose of proceeding to outlawry. The distringas having afterwards become inoperative through the defendant's own laches:—Held, that the fact of its having issued whilst the distringas was current and in force, did not destroy the validity of the alias pluries summons.

5. *Semble*, that a party cannot simultaneously issue writs of summons, alias, and pluries for the purpose of saving the statute of limitations, and writs of distringas for the purpose of proceeding to outlawry.

6. A capias or distringas issued with a view to outlawry, must be lodged with the sheriff fifteen days at least before it is returnable.

7. A distringas, issued under the authority of a rule of court, having become inoperative in consequence of the plaintiff's laches in not delivering it to the sheriff in proper time, the plaintiff, without any new authority, issued another, tested on the same day, but returnable ten days later:—The Court ordered it to be set aside.

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The motion was for a distringas to compel appearance to the *second* writ of summons, but by mistake the writ upon the face of it purported to be issued for non-appearance to the *third* writ of summons. This writ being thus incorrectly issued to compel appearance to a non-existing writ, and to compel appearance when appearance could not be enforced, the defendant being abroad; the plaintiff, on the 2nd June, 1838, obtained a rule absolute to vacate the distringas, and to issue another, for the purpose of proceeding to outlawry for default of appearance to the alias writ of summons.

A new writ of distringas accordingly issued on the 7th June, returnable on the 2nd November (67).

By the 2 Will. 4, c. 39, s. 5, it is provided that "no writ of capias or distringas shall be sufficient for the purpose of outlawry or waiver, if the same be *returned* within less than fifteen days after the delivery thereof to the sheriff or other officer to whom the same shall be directed." The plaintiff's attorney having kept the last mentioned writ of distringas in his possession until the 25th October, and a doubt arising as to whether the words of the statute would be satisfied by the writ being in the sheriff's hands fifteen days before its actual return, or whether the fifteen days must precede the *return day*, another distringas was issued on the 25th October, tested on the 7th June, and made returnable on the 12th November. This writ was in fact issued without any authority, but it purported to be issued by virtue of a "judge's order filed 7th June, 1838."

W. H. Watson, on the fourth day of last Michaelmas Term, obtained a rule calling upon the plaintiff to shew cause why the several writs of summons, alias, and pluries summons, and three writs of distringas issued in this cause, should not be set aside for irregularity, with costs.—The

(67) The statute 2 Will. 4, c. 39, s. 5, requiring these writs to be made returnable "on a day certain in term."

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grounds of objection were—1. That the residence of the defendant was not correctly stated in the several writs of summons; the affidavits shewing that the defendant left Russell Square at Michaelmas, 1833, and went to reside in Euston Square, whence she went to Southampton, and ultimately to Boulogne. 2. That the pluries writ of summons was issued before the alias was returned and filed of record. 3. That the first writ of distringas was altogether a nullity, inasmuch as it was not issued until after the alias summons had expired—*Lemon* v. *Lemon*, 2 Scott, 506; *Abbotts* v. *Kelly*, 4 Scott, 456, 3 New Cases, 478, 5 Dowl. 478. 4. That the alias pluries writ of summons was issued pending the existence of a distringas regularly issued pursuant to a rule of court; and that it was not competent to the plaintiff to issue the two sets of process concurrently—the one to save the statute of limitations, and the other to proceed to outlawry—*Reay* v. *Youde*, 2 M. & Welsby, 188, 5 Dowl. 340. 5. That the first writ of distringas having been returned and filed of record before the motion by the plaintiff to quash it, a fact which was not brought to the notice of the court, that writ was still a subsisting writ. 6. That the second writ of distringas was unavailing, inasmuch as it had not been left with the sheriff fifteen days before its return. 7. That the third writ of distringas, having issued without any authority whatever, and being tested of a day other than the day on which it issued, was also a nullity.

1. Residence of the defendant.

2. Pluries summons irregular.

3. Distringas irregular, being issued after the expiration of the alias summons.

4. Alias pluries summons irregular, having issued pending the distringas.

5. First distringas not properly quashed.

6. Second distringas void.

7. Third distringas issued without authority.

Wilde, Serjeant, on a former day in this term, obtained a rule nisi to amend the teste of the third writ of distringas by altering it from the 7th June to the 25th October, the day on which it issued. He cited *Stevenson* v. *Castle*, 1 Chit. 349, and *Byfield* v. *Street*, 3 M. & Scott, 406, 10 Bing. 27.

Rule for amendment.

Wilde, Serjeant, shewed cause against the rule obtained by *Watson*.—1. The defendant was properly described as

First point.

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of her last known place of residence, the place to which the promissory notes on which the action was brought were addressed. All that the statute requires, is, that the best local description be given that the plaintiff has the means of giving:—"In every such writ and copy thereof the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be or shall be supposed to be, shall be mentioned." Here, 53 Russell Square is to a reasonable intendment the supposed residence of the defendant: the plaintiff knows of no other. In *Clarke* v. *Palmer*, 9 B. & C. 153, 4 M. & R. 141, where a ca. sa. not indorsed with the abode and addition or other description of the parties against whom it issued, was received by the sheriff without objection, the court refused to set aside the writ, it not appearing that this non-compliance with the rule of Hilary Term, 2 & 3 Geo. 4, placed the sheriff in such a position as to subject him to the risk of an action for an escape. And since the uniformity of process act it is not necessary (whether the process be bailable or not) that the exact residence of the defendant be given: the best description the plaintiff can give (*Buffle* v. *Jackson*, 2 Dowl. 505), or a place at which the defendant may be expected to be found (*Welsh* v. *Langford*, 2 Dowl. 498), will suffice. In *Hill* v. *Harvey*, 2 C. M. & R. 307, "Francis Harvey, late of Devonshire Terrace, New Road," was held to be a sufficient description in a capias, where it appeared that the party had been found by that description, and that he had no settled residence at the time of the arrest, and no other means of identification appeared. In *Margetson* v. *Tugghe*, 5 Dowl. 9, and *Ward* v. *Watt*, 5 Dowl. 94, the process contained no description whatever of the defendant; in *Rolfe* v. *Swann*, or *Swain*, 1 M. & Welsby, 305, 5 Dowl. 106, there was a mere descriptio personæ; and in *Roberts* v. *Wedderburne*, 4 M. & Scott, 488, 1 New Cases, 4, the defendant was detained upon a pluries writ of capias wherein there was a blank left for his place of

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residence, after a capias and alias had been issued describing him as of Chesterfield Street, May Fair, in the county of Middlesex. There was therefore no identification of the party. The objection, at all events, is made too late: the party should have come within the time when the plaintiff might have cured the defect by issuing a fresh writ.

Second point.

2. There is nothing in the statute, nor is there any rule of court, or any practice, requiring that a writ shall be returned and filed of record before another writ is issued in continuation of it. In *Nicholson* v. *Lemon*, 4 Tyr. 308 (nom. *Nicholson* v. *Rowe*, 2 C. & M. 469), it was held that an alias or pluries need not, since the statute 2 Will. 4, c. 39, be tested of the return day of the first writ, and their issuing is not confined by section 10 to any given period after the expiration of the first writ, except issued to prevent the operation of the statute of limitations. So, in *Gregory* v. *Des Anges*, 3 Scott, 534, 3 New Cases, 85, it was held that it is not essential to the validity of an alias or pluries, that the writ of summons or capias should be previously returned, except where the object is to save the statute of limitations, or where the capias is made the foundation of proceedings to outlawry. And Tindal, C. J., says: "Upon reference to the 10th section of the 2 Will. 4, c. 39, I do not find that the return of the capias is made necessary to the issuing of the alias. On the contrary, I am led to infer that it was not necessary, or that it might be made, in ordinary cases, at any time afterwards. Were it not so, great inconvenience would oftentimes result: the sheriff might during the long vacation neglect to make his return, when he could not be ruled to return the writ probably until long after (supposing the defendant's argument is to prevail) the writ had ceased to be an efficient writ. The capias is to be in force four months; but it 'may be continued by alias and pluries, as the case may require, if any defendant therein named may not have been arrested thereon or served therewith'—making the issuing of the

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alias or pluries depend, not on the return of the preceding writ, but on the service or non-service." The question, however, does not properly arise now: it will arise when the statute of limitations is pleaded.

Third point.

3. The next objection is, that the first distringas was not issued until after the expiration of the writ of summons: and *Lemon* v. *Lemon*, 2 Scott, 506, and *Abbotts* v. *Kelly*, 4 Scott, 256, are relied on as authorities to shew that a distringas cannot properly issue after the expiration of the writ of summons. Those cases, however, could not have been well considered: there is nothing in the statute, nothing in principle, nor any analogy to be drawn from the practice of the court, to warrant them. The distringas is a process of *default*. The distringas issued upon the original writ of trespass quare clausum fregit, or venire facias, was founded upon a default in the defendant's not appearing at the return of the original: the defendant was not in default until the writ had expired. So, the distringas issued under the 2 Will. 4, c. 39, only issues by the authority of the court upon an actual or constructive default on the part of the defendant. The notice subscribed to the writ shews that this is so. [*Tindal*, C. J.—The old latitat expired after a year: was it competent to issue a distringas after that period?] Whatever the process, it would be considered out of court at the expiration of a year. It seems a solecism to say that a party can be in default for not appearing to a writ which is still current. There never has been an instance of a distringas being granted before the expiration of the four months, except where the return has been expedited by what is deemed equivalent to an execution of the process. Unlike the writ of capias, the return of the summons cannot be shortened by a judge's order. In *Richards* v. *Townsend*, K. B., Easter Term, 2 Vict., the cases of *Lemon* v. *Lemon* and *Abbotts* v. *Kelly* were cited but not recognized as authorities; Coleridge, J., observing that the appearance is always after the

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writ has ceased to be in force. In *Liddel* v. *Cranch*, 5 Dowl. 662, it was held that a plaintiff has four terms from the service of a writ of summons, within which to enter an appearance for the defendant, if the latter does not appear. Coleridge, J., there says: "This is in effect an application to non pros. the plaintiff for not proceeding on his writ. Now, the rule is that he cannot do that in less than four terms after the service of the process. If the defendant wants to expedite the plaintiff, he should rule him to proceed. The defendant is served with the writ, and he will not enter an appearance. Why should not the plaintiff be at liberty at any time before the period of four terms has expired to enter an appearance for him? If the defendant will not appear, and I should set aside the appearance entered by the plaintiff for him, he will in fact non pros. the plaintiff before the expiration of four terms." If the defendant may appear after the expiration of the four months, why should not the process to compel him to appear be issued after that time? It is clear therefore that it is competent to the court to order a distringas to issue within a reasonable time after the expiration of the four months during which the writ of summons is in existence.

Fourth point.

4. It is said that the concurrent issuing of the first distringas and the alias pluries writ of summons was irregular. The court of Exchequer, it is true, have held that a distringas for the purpose of proceeding to outlawry may issue after a writ of summons which has been continued by alias and pluries, sued out to save the statute of limitations—*Reay* v. *Youde*, 2 M. & Welsby, 188. This is open to so much doubt that a prudent man would not therefore forbear to renew his writs of summons. Here the plaintiff has no further proceeded upon those writs than causing them to be entered on the roll with returns of non est inventus. Besides, the distringas issued by the authority of a rule of court; and therefore the application should have been to set aside the rule. But, no motion in fact

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was necessary, the writ having already been quashed by the rule of the 2nd June.

Fifth point.

5. It is objected that the rule for issuing the second distringas was improperly obtained, inasmuch as the fact of the first writ having been returned and filed was not disclosed to the court. Nothing, however, was done upon this second writ. The plaintiff chose to abandon it, which so long as it remained in his possession he had a perfect right to do, and issued another: this part of the motion therefore was wholly unnecessary.

Sixth point.

6. The answer to the sixth objection also is, that the motion was unnecessary, the writ to which it applies having already been abandoned.

Seventh point.

7. On the 31st January, 1838, a rule was obtained for a distringas *to compel appearance* to the second or alias writ of summons. The distringas issued pursuant to that rule was issued on the 1st March, and professed to be for default of appearance to the third or pluries summons, which, having issued on the 29th January, was still in force, On the 2nd June, therefore, the plaintiff obtained a rule to quash the former distringas, and to issue another *for the purpose of proceeding to outlawry*. The distringas issued pursuant to this last-mentioned rule was afterwards abandoned, for two reasons:—Every writ issued by authority of the 2 Will. 4, c. 39, must bear date on the day on which it is issued—ss. 3, 12; no writ is to be in force more than four calendar months—s. 10; and the distringas must be returnable on some day in term—s. 3. The second distringas in this case, founded upon the rule of the 2nd June, issued upon the 7th of that month, and was returnable on the 2nd November, nearly *five* months after the teste. The 5th section of the 2 Will. 4, c. 39, requires the distringas to be lodged with the sheriff for fifteen days before "the same shall be *returned*:" and a doubt arose as to whether the statute meant the fifteen days to precede the *return day* of the writ, or the day on which the return

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might actually be made by the sheriff. To obviate these two objections it was that the second distringas was abandoned, and a new one issued, under the authority of the rule of the 2nd June. If that writ was warranted by the rule of court, the fact of its having been issued upon a præcipe mistakenly calling the rule of court a judge's order, will not avoid it.

As to the amendment of the third distringas.

In support of the application for leave to amend the third writ of distringas, by making the teste agree with the day on which it issued, as required by the 2 Will. 4, c. 39, s. 3, *Wilde* cited Comyns's Digest, *Amendment*, (C. 1.); 8 Rep. 156. b.; *Byfield* v. *Street*, 3 M. & Scott, 406, 10 Bing. 27; and *Lakin* v. *Watson*, 2 Dowl. 633, 2 C. & M. 685, 4 Tyr. 839, where Parke, B., is reported to have said that "all the judges have come to the resolution that in future since the uniformity of process act, no amendment of this kind ought to be allowed, unless where the statute of limitations would be a bar, and that that is to be the only exception." (68)

First point.

W. H. Watson, in support of his rule.—1. The 1st section of the 2 Will. 4, c. 39, provides, that, in every writ of summons, and copy thereof, "the place and county of the residence or supposed residence of the party defendant, or wherein the defendant shall be or shall be supposed to be, shall be mentioned;" and that "every such writ may be served in the county therein mentioned, or within two hundred yards of

(68) *Wilde* also objected that the application to set aside the writs was made too late, particularly as the defendant had been before the court in Trinity Term last with a motion to set aside the proceedings to outlawry on the ground that the defendant was abroad.

To this it was answered by *Watson*, that the motion referred to failed because the attorney did not appear to be duly authorized to act for the defendant; and that the defendant's now attorney was only apprised on the 3rd November last (two days before this rule was obtained) of the existence of the third writ of distringas, which being a pocket writ, delivered to the sheriff with instructions to return nulla bona and non est inventus, he could not have been aware of earlier.

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the border thereof, and not elsewhere." The defendant's residence here is stated to be "No. 53, Russell Square;" and the affidavits positively aver that she left that place in September, 1833, and has never resided there since, and they go on to shew all her subsequent places of residence down to the present time. A place the party is known to have left, cannot fairly be said to be either his *actual* or his *supposed* residence. In *Rolfe* v. *Swann*, it was held that the blank following the word "of" in the form of the capias given in the statute, must be filled up with the place of the defendant's *actual* or *supposed* residence, or, if the plaintiff have no knowledge of these, with the place where the defendant *is* or *is supposed to be*, in conformity with the directions given in s. 1 as to the writ of summons: and "T. S., a clerk in the Army Pay Office, Somerset House, in the city of Westminster, and county of Middlesex," was held not to be a sufficient description of the defendant in a capias. Alderson, B., there says: "If the attorney is utterly without knowledge where the defendant resides, why not fill up the blank with the place 'of' where he supposes him to be. Of course he must do this at his peril; because if it appears that he could give a better description, he is bound to do so."

Second point.

2. The alias writ of summons expired on the 31st December, 1837, and was returned and filed of record on the 6th February, 1838. The pluries was issued on the 29th January. That clearly is a fatal blot. The affidavits filed on the part of the plaintiff state that the alias was returned and filed on the 30th January. This, however, is contradicted by the entry made by the officer of the court, which must be accredited by the court (69): besides, if it were so, it would equally be too late. The 10th section of the 2 Will. 4, c. 39, enacts, "that no writ issued by authority of this act shall be in force for more than four calendar months

(69) See Hynde's Case, 4 Rep. 70. b.; Howard's Case, Owen, 132; Garrick v. Williams, 3 Taunt. 540.

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from the day of the date thereof:" and provides, "that no first writ shall be available to prevent the operation of any statute whereby the time for the commencement of the action may be limited, unless the defendant shall be arrested thereon or served therewith, *or* proceedings to or toward outlawry shall be had thereupon, *or* unless such writ, and every writ (if any) issued in continuation of a preceding writ, shall be returned non est inventus, and entered of record within one calendar month next after the expiration thereof, including the day of such expiration, *and* unless every writ issued in continuation of a preceding writ shall be issued within one such calendar month after the expiration of the preceding writ, and shall contain a memorandum indorsed thereon or subscribed thereto, specifying the day of the date of the first writ." The writ must be returned and filed of record before another can issue in continuation of it.

Third point.

3. All the writs of distringas issued after the *expiration* of the alias writ of summons. The distringas now in use bears no analogy whatever to the old writ of distringas treated of in Tidd's Practice, 9th edit., 113, et seq., and in the other books of practice: it is entirely the creature of the statute; which enacts—s. 3—"that, in case it shall be made appear by affidavit, to the satisfaction of the court out of which the process issued, or, in vacation, of any judge of either of the said courts, that any defendant has not been personally served with any such writ of summons as thereinbefore mentioned, and has not according to the exigency thereof [that is, within eight days after service], appeared to the action, and cannot be compelled so to do without some more efficacious process, then and in any such case it shall be lawful for such court or judge to order a writ of distringas to be issued, directed to the sheriff of the county wherein the dwelling-house or place of abode of such defendant shall be situate, or to the sheriff of any other county, or to any other officer to be named by such

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court or judge, in order to compel the appearance of such defendant." The decisions in *Lemon* v. *Lemon*, 2 Scott, 506, and *Abbotts* v. *Kelly*, 4 Scott, 456, 3 New Cases, 478, 5 Dowl. 478, are correct in principle, and warranted by the language of the statute. They have been acted upon by the Court of Exchequer, and have never been questioned save as asserted in the unreported case of *Richards* v. *Townsend*. Convenience requires that there should be some known and definite rule upon the subject: and none can be more convenient or more consonant with good sense than that adopted by this court in the two cases above referred to (70). How can the court compel an appearance according to the exigency of a writ that has ceased to be an existing writ.—At all events, the writ must be sued out within a reasonable time. Here the alias writ of summons issued on the 1st September, 1837, and consequently expired on the 31st December in the same year. The first writ of distringas was not issued until the 1st March, 1838, pursuant to a rule moved for on the 31st January. That writ being abandoned, a second was issued on the 7th June, pursuant to the rule of the 2nd—a period of five months having then elapsed since the expiration of the writ of summons. This under any circumstances was an unreasonable and unjustifiable delay.

Fourth point.

4. The plaintiff clearly had no right to carry on collateral proceedings by writs of summons to continue the process after having by issuing the second distringas conclusively elected to proceed to outlawry—*Reay* v. *Youde*, 2 M. & Welsby, 188, 5 Dowl. 340. [*Tindal*, C. J.—That may be

(70) In the course of the argument, Tindal, C. J., asked whether the motion in Lemon v. Lemon and Abbotts v. Kelly was made within the fifth month. Lemon v. Lemon appears from the report of the same case (nom. Sewell v. Brown) 1 Hodges, 317, to have been moved *after* the expiration of the fifth month. In the reports of Abbotts v. Kelly the fact does not appear: but, on reference to the affidavits filed at the rule office, it appears that the writ of summons was tested the 9th July, 1836, and the distringas the 10th December.

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so: but, one of your objections is that that distringas is irregular and void: is it not, therefore the same as if it had never issued at all? The distringas issued pursuant to the rule of court of the 2nd June, was a perfectly good writ at the time it issued (71): it only became inoperative by the plaintiff's own laches. The court will not allow two writs of distringas to issue at the same time—the one to compel an appearance, and the other to proceed to outlawry: nor will they allow the writ to go in the alternative—*Fraser* v. *Case*, 4 M. & Scott, 720.

Fifth point.

5. The first writ of distringas is still upon the files of the court: the defendant is clearly entitled to have it removed.

Sixth point.

6. No answer has been given, and none could be given to the sixth objection: the second distringas had clearly become inoperative through the plaintiff's own default.

Seventh point.

7. The third distringas was also clearly a nullity. Not only was it issued without any authority, and upon a fraudulent representation that it was authorized by a judge's order that never had any existence; but, in defiance of the statute (2 Will. 4, c. 39, s. 3), it bore teste on a day anterior to the day of its issuing.

As to the rule to amend the third writ of distringas.

As to the proposed amendment of the third writ of distringas—The courts have over and over again refused to amend writs of capias—*Hodgkinson* v. *Hodgkinson*, 3 N. & M. 564; *Colston* v. *Berends*, 1 C. M. & R. 833, 3 Dowl. 253, 1 Tyr. 511; *Mills* v. *Gossett*, 1 Scott, 313; *Trotter* v. *Bass*, 1 Scott, 403 (72). In *Kenworthy* v. *Peppiat*, 4 B. & A. 288, a writ returnable on a dies non was held to be altogether void; and the court refused to allow it to be amended. With respect to the rule said to have been laid down by

(71) Not so. There were more than four calendar months between the teste and the return of it. See 2 Will. 4, c. 39, s. 10.

(72) See Shirley v. Jacobs, 1 Scott, 67, where the court take a distinction between a form prescribed by act of parliament, and one by rule of court.

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Parke, B., in *Lakin* v. *Watson*, 2 Dowl. 633 (but which is not stated with the qualification in the report in 4 Tyr. 839), Lord Denman, in *Roberts* v. *Bate*, 6 Ad. & E. 778, says—"I have every possible disposition to bow to any decision adopted on consideration by the court of Exchequer, or any other court; but I doubt the power of the courts to do any such thing as was there done. I doubt whether parties named on writs, and having, by the manner in which they are named, certain defined rights, are to be deprived of them by an alteration which the opposite party finds necessary in consequence of his own mistake." And Patteson, J., adds: "In one report of the last cited case, my Brother Parke is represented to have said that the judges have resolved not to allow an amendment of this kind in future, except where, by a refusal, the party would be deprived of his action. I think this has been misunderstood. There was some discussion how far writs of summons should be amended in future; but, as to adding the name of a party (73), I disclaim having sanctioned it, and have no doubt this is a mistake in the report. I would not so extend our authority."

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court:—

The rule which has been obtained by the defendant in this case calls upon the plaintiff to shew cause why the several writs of summons, alias, and pluries summons, and three writs of distringas, issued in this cause, should not be set aside for irregularity, with costs. And, in order to see the nature of the irregularity complained of, it will be necessary to state briefly the particulars of each.

Writ of summons.

The original summons was issued on the 5th April, 1837, and returned on the 1st September of the same year. The

(73) Eubanke v. Owen, 5 Ad. & E. 298.

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alias was issued on the 1st September, 1837, and returned, according to the statement of the plaintiff, on the 30th January; according to that of the defendant, on the 6th February, 1838. The pluries was issued on the 29th January, and returned and filed on the 27th June. And in addition to these, an alias pluries writ has been issued on the 27th June, which has not yet been returned.

Pluries.

Alias pluries.

There have also been three writs of distringas issued. The first on the 1st March, 1838, pursuant to a rule of the 31st January preceding, for non-appearance to the pluries summons, and returnable on the 16th April. This writ was returned and filed on the 1st May. But, on the 2nd June the plaintiff applied to quash his own writ of distringas for appearance, and issued another for non-appearance to the alias summons of the 1st September. This second writ of distringas issued accordingly on the 7th June, under the rule of the 2nd, returnable on the 2nd November, for non-appearance to the alias summons of the 1st September. The third distringas issued on the 25th October, tested on the 7th June, for the purpose of proceeding to outlawry on the alias writ of summons of the 1st September, 1837, without any further rule or order.

First writ of distringas.

Second.

Third.

It may be convenient to consider, in the first place, the objections which have been raised against the regularity of the writs of distringas; because the disposing of the legality or regularity of these writs very much clears the way to the consideration of the writs of summons, and the several objections thereto.

Now, the first distringas having been quashed by the court, on the plaintiff's own motion, by rule of the 2nd June, upon the ground, as it would seem, of irregularity (having been issued by virtue of a rule of the 31st of January, for non-appearance to the pluries summons, tested only on the 29th January), may, as it appears to us, be considered as if it had never existed, and be altogether laid out of the case.

First distringas.

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Second distringas.

The second writ of distringas, which issued on the 7th June, pursuant to the rule of the 2nd June, was perfectly regular; but this writ having been made returnable on the 2nd November, and retained by the plaintiff's attorney, and not taken to the sheriff until the 25th October, became useless, in consequence of there not being fifteen days, as required by the statute [2 Will. 4, c. 39, s. 5], between that day and the day of the return. What effect the writ thus sued out, but not acted upon, ought to have upon the plaintiff's proceedings by writs of summons taken out, or intended to be taken out, in continuation of each other, we will afterwards proceed to consider.

Third distringas.

The third distringas for the purpose of outlawry was issued on the 25th October, and made returnable on the 12th November, for the purpose of supplying the place of the second distringas, which had become unavailable. This distringas was issued without any new authority from the court or a judge, and whilst the writ issued pursuant to the rule of the 2nd June was still in existence. Moreover, it was issued on a præcipe subscribed "by judge's order filed 7th of June, 1838;" though no such order was ever in fact made. The existence of this writ was not discovered till the 3rd of November, 1838; and the motion to set it aside, together with all the other writs, was made on the 5th. The issuing of this writ being wholly unwarranted by any authority, if it is not to be considered as a mere nullity, we think must be set aside. There remains, therefore, only the second distringas, which, as we before observed, is subject to future consideration.

Objections to the writs of summons.

1. Defendant's residence.

Now, the objections to the writs of summons are these:—First, it is objected to all of them that the defendant's place of residence or supposed residence is misdescribed. It appears, however, that the place of her supposed residence mentioned in these writs agrees with the place at which are dated the promissory notes upon which the action is brought, and which was once the place of the defendant's true resi-

dence: and, though it was also stated that she ceased to reside there in 1833, it does not appear that any other place of her residence was brought home to the actual knowledge of the plaintiff before these writs respectively were issued. We think, therefore, that the plaintiff was authorized to treat the place mentioned in the promissory notes as the supposed residence of the defendant.

2. Pluries summons issued before the alias returned and filed.

A second objection has been made to the pluries writ of summons, because it was issued before the alias was returned. The original writ was returned and filed before the alias was issued; and the pluries was issued within a month after the expiration of four months from the teste of the alias. A question therefore arises, whether or not it is material, in order that this writ should be a continuation of the alias, that the alias have been returned. But, as this is a point which may, if it becomes necessary, be determined in a more solemn manner by putting the several writs of summons on the record, we forbear at present from expressing any opinion thereon.

3. Alias and pluries writs of summons issued after the expiration of the previous writs.

Another objection has been raised as to the regularity of the alias and pluries writs of summons—that they were issued and bear teste after the previous writs of summons, of which they were intended to be a continuation, had been suffered to expire (74). But, notwithstanding the cases which have been cited, in which this court refused to allow the issue of writs of distringas after the lapse of four months from the teste of the summons, we think, upon reconsideration, that the plaintiff's right to continue writs of summons by alias and pluries, and to issue writs of distringas thereupon by leave of the court or a judge, is not confined to the period during which the summons is in force (75).

(74) This was not the precise objection. See the 3rd point, ante, p. 253.

(75) If the writ of summons has not been *served* within the four months, and no motion has been made for a distringas, it is difficult to see how an available appearance *can* be entered by the defendant according to the exigency of such

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It is unnecessary in the present case, to determine the extent of time within which this right may be exercised; the writs in question having been issued within one month from the expiration of the preceding writs.

4. Alias pluries summons issued while the first distringas was in force.

It is further objected, that, as the alias pluries was taken out while a distringas for the purpose of proceeding to outlawry, which had regularly issued in pursuance of a rule of court, was actually current and in force, such writ of summons is irregular, and ought to be set aside: and there may seem to be some difficulty in maintaining that a party who by leave of the court has been permitted to quash his own process to compel appearance, and has actually issued process of outlawry pursuant to the authority granted to him, can regularly resort to process to compel appearance in continuation of the course of proceeding which he has had leave to abandon, and carry on simultaneously process to

expired writ. A defendant cannot be said to be in *default* for not appearing to process of which he has had *no notice*, either actual or constructive.

The distringas that is usually moved for is not strictly speaking issued for any *default* on the part of the defendant *in not appearing:* the object of the statute is, to dispense with personal service, where it appears that the defendant *keeps out of the way to avoid service. This* is in fact the *default:* and therefore there can be no reason why the distringas should not be moved for pending the four months. That it *may* be so moved for, is undoubted.

But it seems a very different thing to say that a writ of summons which the *statute* declares shall be *in force* only four months, unless continued by alias or pluries, as the case may require, may be the foundation of a distringas, *after the four months have expired*, for an alleged *default* in not appearing to process *to which the party has no right to appear*. The process cannot be *served* after the four months.

In Liddel v. Cranch, 5 Dowl. 662, the defendant was duly *served* with the process, and therefore *might* and *ought* to have appeared "according to the exigency thereof."

If the distringas may be issued within the *fifth* month, why may it not be issued at any time within *twelve* months? There is nothing in the statute, nor is there any rule or analogy, to limit it to *five* months. And it would be unnecessary to point out the inconvenience that would result from holding a party liable to have a distringas sued out against him, founded upon a writ that had been eight months defunct!

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compel appearance, and process to outlawry. But we think it would be imposing upon a party who issues process too strict a rule of practice, to determine that the second writ of distringas issued on the 7th June, which was never delivered to the sheriff, and upon which no proceedings whatever were taken, but which was altogether abandoned by the plaintiff himself, should be considered as an existing writ, for no other purpose than that of preventing the plaintiff from continuing his writs of summons: and at all events we think this second writ of distringas ought to be set aside, as the defendant has moved that it should be.

Result.

The consequence is, that all the writs of summons remain in force, and all the writs of distringas are to be set aside.

As to the costs of the rule.

And we think there are circumstances in this case which make it unadvisable to give the costs to either party, but that they should be costs in the cause; the defendant's rule being made absolute as to part, and the plaintiff's cross-rule, to amend the teste of the writ of distringas which issued on the 25th October last, being discharged, as the distringas was issued altogether without any authority.

Rules accordingly.

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Thursday, Jan. 31st.

To a declaration in which the plaintiff claimed 50*l.* for goods sold and delivered, 50*l.* for money had and received, and 50*l.* on an account stated, the defendant pleaded payment of 50*l.*, not averring it to have been paid in satisfaction of the causes of action. The plea professing to be an answer to the whole declaration, the plaintiff joined issue on the allegation of payment of the 50*l.*, and signed judgment for the damages ultra:—The Court set aside the judgment, but without costs.

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ASSUMPSIT for 150*l.*, being 50*l.* for goods sold and delivered, 50*l.* for money had and received by the defendant to the plaintiff's use, and 50*l.* for money due upon an account stated.

The defendant pleaded as a bar to the whole action, payment of 50*l.*, not alleging it to be in satisfaction, and commencing with an allegation of actionem non.

The defendant took issue upon the plea of payment, and signed judgment for the demand ultra, and gave notice of the assessment of damages.

Chandless, on a former day, obtained a rule nisi to set aside this judgment for irregularity.—He produced an affidavit, in which it was sworn that the action was brought to recover 29*l.* 4*s.* 6*d.* only: and contended that, instead of signing judgment, the plaintiff should have demurred to the plea—*Vere* v. *Goldsborough,* 1 Scott, 265, 1 New Cases, 353. There, to a declaration consisting of two counts—the first against the defendant as the acceptor of a bill of exchange—the other on an account stated—the defendant (without a rule to plead several matters) pleaded "that he did not accept the bill of exchange in the declaration mentioned; and, for a further plea, that he did not account with the plaintiff as in the declaration was alleged." The plaintiff having signed judgment as for want of a plea, the court set it aside, holding that the informality could only be taken advantage of on special demurrer.

Wilde, Serjeant, now shewed cause.—The object of the plea evidently was to provoke a demurrer, and so gain time. But the plaintiff was not bound to take the objection: it was perfectly competent to him to give effect to the plea, and treat it as a substantially good plea. [*The-*

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C. J.—In *Weeks* v. *Peach*, 1 Salk. 179, 1 Lord Raym. Holt, C. J., says: "If a plea begin with an answer to whole, but in truth the matter pleaded is only an er to part, the whole plea is naught, *and the plaintiff demur;* but, if a plea begin only as an answer to and is in truth but an answer to part, it is a discon-nce (R. acc. Lord Raym. 231, Str. 302), and the tiff must not demur but take his judgment for that as l dicit; for, if he demurs or pleads over, the whole n is discontinued."] No doubt the plaintiff *might* demurred; but the question is whether he was *bound* so or not. The court will give judgment according e legal effect of the plea.

andless, in support of his rule.—The simple question nether a plea which is formally pleaded as an answer e whole cause of action, but is in substance and effect nswer to part only, can be treated as a good plea to and a judgment signed for the residue of the demand, ut the authority of the court. No case is to be found rrant this. On the contrary, it is laid down in all the s that this is ground of demurrer—1 Wms. Saund. 28,); 1 Chitty on Pleading, 6th edit., 523 (77). In ey v. *Swann*, 2 M. & Welsby, 72, the declaration con-d one count on a bill of exchange against the acceptor, a second count on an account stated: the defendant

) In 1 Chitty on Pleading, lit., p. 524, it is said: "If a rofess in its commencement wer the whole cause of action, terwards answer only part of whole plea is bad: and in stance, the plea being insuf-, the plaintiff's course is, to generally or specially, and will be no discontinuance by ig, or by replying, instead of judgment as to the unan-swered part." The authorities cited are 1 Wms. Saund. 28, n. (3); Weeks v. Peach, 1 Salk. 179, 1 Ld. Raym. 679; Cooper v. Monke, Willes, 55; Wilson v. Newman, 1 Chit. Rep. 132; Thomas v. Heathorne, 3 D. & R. 647, 2 B. & C. 477; Crump v. Adney, 3 Tyr. 279; Stephen on Pleading, 2nd edit., 245; Clarkson v. Lawson, 6 Bing. 266, 4 M. & P. 356.

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pleaded that he did not accept the bill of exchange in the declaration mentioned, taking no notice of the count on the account stated: and it was held that the plea was bad on special demurrer; but that the plaintiff was not entitled to sign judgment. In the case before cited of *Vere* v. *Goldsborough*, Tindal, C. J., says: "I think the plaintiff should have demurred specially, and not have taken upon himself to sign judgment. The defendant has fallen into a breach of the rules of pleading rather than of practice; and the question, if necessary, might have been raised upon special demurrer." And see *Worley* v. *Harrison*, 5 N. & M. 173.

TINDAL, C. J.—I am unable to distinguish this case from the rule laid down in *Weeks* v. *Peach*, 1 Salk. 179, 1 Lord Raym. 679, which shews that this objection should have been made the subject of a special demurrer. I therefore think the judgment that has been signed must be set aside; but, as the plea was evidently intended to invite a demurrer, the costs will be costs in the cause.

The rest of the court concurring—

Rule absolute accordingly.

Thursday, Jan. 31st.

THORNHILL *v.* OASTLER.

The court refused to change the venue from London to Yorkshire, on the ground that the expense of bringing his witnesses (sixty in number) from Yorkshire to London, would be ruinous to the defendant—the affidavit condescending upon nothing specific.

ATCHERLEY, Serjeant, on a former day, obtained a rule calling upon the defendant to shew cause why the venue in this case should not be changed from London to Yorkshire. The affidavit upon which the rule was obtained (that of the defendant himself), stated that the action was brought to

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recover an alleged balance due from him for money received by him as steward of the plaintiff; that, in order to establish a set-off, which he had pleaded, it would be necessary to unravel accounts of eighteen years' standing, that he had sixty witnesses to subpœna, all of whom resided in Yorkshire: and that a trial in London would occasion an additional expense to him of more than 2,000*l.*, which he was wholly unable to bear.

Wilde, Serjeant, shewed cause, upon an affidavit in which it was sworn that the accounts between the parties had been settled down to July, 1837; and that the action was brought to recover the balance of rents received by the defendant since that time, as well as the amount of a bill of exchange accepted by the defendant in 1836.—He relied upon the plaintiff's general right to lay the venue where he pleased, and submitted that there was nothing in this case to vary it from the general rule.

Atcherley, Serjeant, in support of his rule.—The right of a plaintiff to lay the venue where he pleases, exists only until the court are satisfied that the preponderance of convenience is in favour of a trial elsewhere. To refuse to change the venue under the circumstances disclosed in the defendant's affidavit, will be in effect a denial of justice.

TINDAL, C. J.—The plaintiff's right in a transitory action to lay the venue where he pleases, is undoubted; and before we deprive him of it we must be clearly satisfied that justice cannot be done between the parties unless we do so: the preponderance of convenience must be *very great indeed*. I never heard an application of this sort made without disclosing something more specific than appears here. The defendant's affidavit broadly states that he has sixty witnesses to call, and that a trial in London will occasion him an increased expense of 2,000*l.* Without

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offering any opinion upon this assertion, I must say that I should have been better satisfied if the affidavit had contained something more specific as to the grounds of the alleged set-off. I am by no means satisfied with the generality of the defendant's statement; and my surprise is increased by the affidavit filed in answer.

VAUGHAN, J.—This is an application to the discretion of the court; and to induce us to accede to it, the defendant should shew specific grounds to satisfy us that justice requires our interference with the just privilege of the plaintiff.

The rest of the court concurring—

Rule discharged (78).

(78) See the next case.

Thursday, Jan. 31st.

The court refused to change the venue from London to Liverpool, in an action for running down a vessel, upon a suggestion that the defendant intended to call as witnesses (experts) persons in official situations in Liverpool, whose absence thence might be detrimental to the public service.

BUCKNELL and Another *v.* PHILLIPPS.

THIS was an action on the case brought by the plaintiffs, owners of a vessel called the Ant, against the defendant, the commander of a government steam-packet called the Lucifer, for negligently running down the former vessel.

Wilde, Serjeant, on a former day in this term obtained a rule nisi to change the venue from London to Liverpool, and also to postpone the trial until the next Summer Assizes.—The first part of the rule was based upon a suggestion that it would be necessary for the plaintiffs to call as witnesses certain public officers, whose absence from Liverpool might occasion detriment to the public service; the second, upon a statement that the attendance of certain witnesses who

were on board the Lucifer at the time the collision took place could not be earlier obtained.

Maule, for the plaintiffs, now shewed cause.—He submitted that there was no ground laid for changing the venue, the proposed witnesses not being such as could speak to facts, but merely scientific persons, of whom there was no dearth in London: and, as to the postponement, that putting off the trial until the sittings after Easter Term, would give the defendant ample time to get his witnesses together.

Wilde, Serjeant, in support of his rule.—Changing the venue as proposed will occasion no inconvenience to the plaintiffs; and the defendant has no object in asking it, save public convenience. The trial must at all events be postponed until the sittings after Trinity Term, no special jury causes being, by reason of the shortness of the vacation, taken at the sittings after Easter Term.

TINDAL, C. J.—The rule may be made absolute to the extent of postponing the trial until the sittings after Trinity Term. But it does not appear to me that the case made out on the part of the defendant is strong enough to induce us to take away from the plaintiff the right the law has given him to lay the venue where he has thought fit to lay it.

The rest of the court concurring—

Rule discharged (79).

(79) See the preceding case.

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The plaintiff declared upon a special contract, made by one P. S. as agent for the defendant, for the sale of a large quantity of fir sleepers, assigning for breaches—first, that certain sleepers were delivered to and received by the defendant, but not paid for—secondly, that a certain other quantity were shipped on board a vessel called the Hope, and conveyed to London for the defendant, but that he refused to accept them—thirdly, that the defendant declined to accept the residue. There was also a count for goods sold and delivered. The defendant pleaded—first, as to all but 39*l.* 7*s.* 11*d.* in the last count, non assumpsit; paying that sum into court, which the plaintiff accepted in satisfaction of his demand upon that count—secondly to the special count, that P. S. was not his agent—thirdly, to the same count, that the plaintiff did not deliver, nor did he accept, the sleepers that were the subject of the first breach—fourthly, that plaintiff did not offer to deliver the residue. The cause was referred, the costs to abide the event of the award. The arbitrator found, that, at the time of the commencement of the action, the defendant *was liable to pay* the plaintiff 75*l.*, which sum he directed him to pay, minus the sum paid into court; and he further found that the sleepers shipped on board the Hope were the property of the plaintiff and at his disposal:—Held, that this was a sufficient finding upon both counts to entitle the plaintiff to the costs of all the issues.

THIS was an action of assumpsit. The first count was upon a special contract made between the plaintiff and one Peter Scott as agent for the defendant, for a quantity of Scotch fir sleepers, at a certain price, to be paid for in cash on the delivery of each cargo, the whole to be delivered before a given day. The breaches assigned were—first, that thirty-nine larch and one hundred and ninety-five Scotch fir sleepers were delivered to and accepted by the defendant, but not paid for—secondly, that the defendant refused to accept one hundred and sixty-nine larch and two hundred and eight Scotch fir sleepers, which the plaintiff had shipped and conveyed to London on board the Hope—thirdly, that the defendant refused to receive the residue.

There was also a count for goods sold and delivered.

The defendant pleaded—first, as to all but 39*l.* 7*s.* 11*d.*, in the last count, non assumpsit; paying that sum into court, which the plaintiff accepted in satisfaction of his demand upon that count—secondly, to the special count, that Peter Scott was not the agent of the defendant—thirdly, to the same count, that the plaintiff did not deliver, nor did the defendant accept, thirty-one larch and one hundred and ninety-five Scotch fir sleepers, as in that count alleged—fourthly, that the plaintiff did not offer to deliver the residue in the manner and at the time agreed on. Issue thereon.

The cause was referred to a merchant—the costs of the cause to abide the event of the award.

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The arbitrator found, that, at the time of the commencement of the action, the defendant was liable to pay the plaintiff 75*l.*, which sum he directed him to pay, minus the 39*l.* 7*s.* 11*d.* paid into court; and he further found that the one hundred and sixty-nine larch and two hundred and eight Scotch fir sleepers shipped on board the Hope, were the property of the plaintiff, and at his disposal.

Award.

On the taxation of costs, it was contended before the Master, on the part of the defendant, that this was in effect a finding for the plaintiff on the second count only. The Master, however, thought otherwise, and allowed the plaintiff the entire costs of the cause.

Talfourd, Serjeant, on a former day in this term, obtained a rule nisi for a review.—He submitted that the finding was simply a finding that enough had not been paid into court on the count for goods sold and delivered; and that, as there was no specific finding upon the special count, the plaintiff was not entitled to the costs attendant thereon.

TINDAL, C. J.—The damages found by the arbitrator are just as referable to the special count as to the count for goods sold and delivered. But for the mention of the payment into court, which creates a little ambiguity, there could be no difficulty. It is fit, however, to be considered.

Wilde, Serjeant, and *Channell*, now shewed cause.—It is a mistake to suppose that the arbitrator has determined the issue on the last count only in favour of the plaintiff. The action was brought to recover 39*l.* 7*s.* 11*d.*, the invoice price of the sleepers that were delivered to and accepted by the defendant, as well as damages for not accepting those shipped on board the Hope; and also damages for the general breach of the contract. [This appeared by affidavit.] The arbitrator has in fact given dama es in respect of the special count. The costs were to abide the event of the

award, not of the cause; and the event of the award settles the question; it gives something to the plaintiff, and *nothing to the defendant*. The court cannot assume that *the arbitrator did not* take the special count into his consideration. Nor will they direct the Master to review his taxation, unless it is affirmatively made out that he has erred upon the materials before him.

Tidd, Serjeant, and *Haywood*, in support of the rule.—It is consistent with the award that there was a further sum claimed on the count for goods sold and delivered, and that the arbitrator has given further damages on that count. [*Tindal*, C. J.—It lies on the defendant to shew that the Master has done wrong: we can presume nothing.] The party who claims to have the costs taxed for him must in the first place make out affirmatively that the award entitles him to them. The second issue, which goes to the whole action, as far as the special count is concerned, is in effect found for the defendant. [illegible] 3 Dowl. 442, [illegible]. It was there held, that, where several [illegible] an arbitrator it is not indispensably [illegible] so that his intention [illegible] from the general [illegible] the award [illegible] if the arbitrator [illegible] he would not [illegible] So, [illegible] upon all [illegible] [illegible] 4 M. [illegible] in [illegible] difference [illegible] the [illegible] [illegible] [illegible] The arbitrators [illegible] respect

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of the matters charged in five of the counts, and awarded 5*l.* damages, and directed that no further proceedings should be had in the cause; but made no specific award as to the three remaining counts. It was held that the award was not final, there being no determination as to the three last mentioned counts, and consequently no legal event as to them to authorize the taxation of costs thereon.

The general principle is clear, that the court will not look out of the award to see the grounds upon which it is made, unless the arbitrator himself desires it. This was so held in *Gensham* v. *Germain*, 11 Moore, 1; and the rule was recognised in this court in the late case of *Jones* v. *Corry*, ante, p. 106.

TINDAL, C. J.—This is not an application to the court to set aside the award, but to review the Master's taxation. The party applying, therefore, must make out affirmatively that the Master has proceeded with the taxation upon an erroneous principle. Looking at the award, it does not appear that the arbitrator omitted to take into consideration the special count. He finds, that, at the time of the commencement of the action, the defendant was liable to pay the plaintiff 75*l.*, which sum he directs him to pay, minus the 39*l.* 7*s.* 11*d.* paid into court. It is said, that, as the 39*l.* 7*s.* 11*d.* were paid in upon the count for goods sold and delivered, it necessarily follows that that count alone was in the contemplation of the arbitrator, and that he came to no conclusion upon the second count. But the special count does in fact involve the same question that is involved in the common count. Why, then, should we hold that the arbitrator intended to limit his finding to the latter count? He must have looked into the special count, and heard evidence upon it; for, he finds further, that the one hundred and sixty-nine larch and two hundred and eight Scotch fir sleepers shipped on board the Hope are the property of the plaintiff, and at his disposal. That is

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consistent with a finding against the defendant upon the special count—that he refused to accept them. At the utmost the matter is ambiguous. It will therefore be useless to send the matter back to the Master. His means of forming a judgment will remain precisely the same. I think the rule must be discharged.

VAUGHAN, J.—I am of the same opinion. *Hunt* v. *Hunt* was an application to set aside a defective award. In the present case I think it sufficiently appears that the arbitrator has taken the whole matter into his consideration, and has adjudicated upon all the issues; and therefore that there is no ground for reviewing the taxation.

BOSANQUET, J.—The finding of the arbitrator is not that the defendant is *indebted* to the plaintiff in the sum mentioned, so as to apply itself to the count for goods sold and delivered; but, generally, that the defendant is liable to pay the money. No motion having been made to set aside the award, we must put the best construction we can upon it. The arbitrator further finds that a definite number of sleepers shipped on board a particular vessel are the property of the plaintiff. Undoubtedly they would be the property of the plaintiff if the defendant did not fulfil his contract. I cannot see that the Master has done wrong.

ERSKINE, J.—The language of the award is equally applicable to both counts; and there is in my opinion nothing to shew that the Master has taken an erroneous view of the case.

Rule discharged, without costs.

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REEVES *v.* BARRAUD and Another.

A stakeholder who bonâ fide comes to the court under the interpleader act, is entitled to his costs out of the fund or the produce of the subject-matter in dispute, to be repaid by the party ultimately unsuccessful.

AN action of trover having been brought by Reeves against the Messrs. Barraud, the chronometer makers, in Cornhill, to recover a chronometer that had been left with them by one Wilson, master of the Don Giovanni, a vessel belonging to the Messrs. Capper, and to which the plaintiff and the Messrs. Capper respectively claimed to be entitled under assignments from Wilson, and the plaintiff refusing to indemnify the defendants against the claim of the Messrs. Capper, the defendants obtained a rule under the interpleader act, calling all the parties before the court to maintain or relinquish their respective claims. An issue was directed, to try the title; in which issue Reeves was plaintiff and the Messrs. Capper defendants. The verdict having been found for the defendants in the issue—see the report on the motion for a new trial, 6 Scott, 877—

Wilde, Serjeant, on a former day in this term, obtained a rule for the delivery of the chronometer to them, subject to any lien the Messrs. Barraud might have upon it, the costs of the issue to be paid by the plaintiff.

Hoggins, for the Messrs. Barraud, claimed to be entitled also to the costs of the motion under the act, their application to the court being bonâ fide, and rendered necessary by the refusal of Reeves to indemnify them.

Kelly, for Reeves, conceded that the costs of the issue must be paid by him; but he submitted that the Messrs. Barraud were not under the circumstances entitled to the costs of their motion. The facts were these:—Reeves made a bonâ fide advance to Wilson upon the security of an order upon Messrs. Barraud for the delivery to him of the chronometer in question, which order they so far ac-

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cepted as to consent to hold the chronometer for him. Wilson becoming bankrupt, and Reeves declining to indemnify the Messrs. Barraud, the latter obtained a rule under the interpleader act, calling upon Reeves and Wilson's assignees to appear and maintain or relinquish their respective claims. After the rule was obtained, Messrs. Barraud had notice of the claim of Messrs. Capper, and they were accordingly made parties to the rule. The result of the issue is as above stated, viz. that the chronometer was ultimately declared to be the property of the Messrs. Capper. Under these circumstances, there can be no pretence for saddling Reeves with Barraud's costs.

Talfourd, Serjeant, for Messrs. Capper.—The Messrs. Capper are clearly entitled to have the chronometer delivered up to them, and to have all their costs. If Messrs. Barraud are entitled to costs at all, they clearly cannot be entitled to receive them from the Messrs. Capper, who were the successful party.

TINDAL, C. J.—This rule must follow the principle we have already laid down in these cases, viz. that, where the stakeholder acts bonâ fide, he is to receive his costs in the first instance out of the subject-matter in dispute, to be borne ultimately by the unsuccessful party. In strictness, the costs of Messrs. Barraud in this case should be paid by Messrs. Capper, who would look to Reeves for them. But, as all the parties are before the court, the better course will be to make a rule directing Reeves at once to pay Messrs. Barraud's costs (80). The Messrs. Capper will of

(80) See Duear v. Mackintosh, 3 M. & Scott, 174, 2 Dowl. 734; Cotter v. The Bank of England, 3 M. & Scott, 180, 2 Dowl. 728; Parke v. Linnett, 2 Dowl. 562; Agar v. Blethyn, 1 Tyr. & G. 160.

As to sheriff's costs, see Barker v. Dymes, 1 Dowl. 169; Dabbs v. Humphries, 1 Scott, 325, 1 New Cases, 412; Thompson v. Sheddon, 1 Scott, 697; West v. Rotherham, 2 Scott, 802, 2 New Cases, 527.

course be entitled to their costs of appearing, as well as to the costs of the issue.

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VAUGHAN, J.—It would be equally unjust to call on Messrs. Capper, who have succeeded, to pay the expense of the motion, as upon Messrs. Barraud, who were ready to give up the chronometer upon receiving an indemnity from Reeves.

The rest of the court concurring—

Rule absolute accordingly.

END OF HILARY TERM.

1837.

DOUGLAS *v.* CONGREVE and Others.

Testator devised lands to M. S., together with the use of all his household goods &c., for life. remainder to the use of J. D. S. for life, with remainder to the use of the heirs of the body of M. S. in tail; remainder to the use of testator's nephew, A. H., for life with remainder to the use of the heirs of his body in tail; remainder to the use of testator's niece, E. H., for life, with remainder to the use of the heirs of her body in tail; remainder to his cousin A. A., for life, with remainder to the use of the heirs of his body in tail: and he declared "that all the aforesaid limitations of his estate were intended by him to be *in strict settlement*, with remainder to his own right heirs for ever:"—Held, that M. S. took an immediate estate for life, and an estate in remainder in tail general expectant on the determination of the estate for life limited to J. D. S.

THIS was a case transmitted for the opinion of this court by the Master of the Rolls. It was argued in Trinity Term, 1837, and on the 25th November following, the following certificate was sent to his Honor:—

"We have heard this case argued, and we are of opinion that the plaintiff took under the will of George Douglas, the testator, an estate in tail general in the real estates of the said testator at Chilston and elsewhere in the county of Kent." See 5 Scott, 223.

An amended certificate was afterwards sent, as follows:—

"We have heard this case argued, and we are of opinion that the plaintiff took, under the will of George Douglas, the testator, an immediate estate for life in the real estates of the said testator at Chilston and elsewhere in the county of Kent, and an estate in remainder in tail general in the same lands, expectant on the determination of the estate for life limited to James Douglas Stoddart.

"N. C. TINDAL.
"J. A. PARK.
"J. VAUGHAN.
"T. COLTMAN."

SITTINGS IN BANC AFTER HILARY TERM.

PURSUANT TO THE STATUTE 1 & 2 VICTORIÆ, c. 32.

PENNEY *v.* SLADE and Another.

Tuesday, Feb. 5th.

THIS was an action of trespass for taking the plaintiff's goods under colour of a warrant of distress issued by the defendants, two of the magistrates of the borough of Poole, in Dorsetshire, to levy a poor-rate.

The cause was tried before Lord Chief Justice Denman, at the Dorset Spring Assizes, 1838. The facts that appeared in evidence were as follow:—

The magistrates of the borough of Poole, besides the two defendants (Slade the elder, the present, and Slade junior, the late mayor), consisted of Captain Festing, Mr. Parrott, Mr. Seager, Mr. Clarke, Mr. Brice, Colonel Pedler, and Mr. Rickman. Notice having been given that a special

Seven magistrates of Poole assembled in petty session for the purpose of appointing two overseers. One of them (the mayor) producing a list containing the names of four who had been recommended as fit persons by the vestry, proposed that the first two should be appointed. One of the other magistrates

objected that both were of one political party, and proposed two from a list of twelve, which he produced. Whilst this gentleman and three others of the magistrates were conferring upon the subject, the mayor drew from his pocket two blank forms with seals attached, and after filling them up with the names of the two he had proposed, and signing them, procured them to be signed by the two magistrates nearest to him, and handed them to the high constable, who was in attendance. After this was done, the magistrate who had proposed the other two, requested that the votes might be taken; when the mayor said it was too late as he had already made the appointment. The votes were however taken by the clerk. Six voted for the two persons last proposed; the other three declined to vote. The overseers thus appointed by the mayor and his two friends, made a rate. The plaintiff refusing to pay the rate, a distress warrant was issued against him by the mayor and one of the other magistrates who signed the appointment. In trespass against the magistrates granting the warrant, for the seizure of the plaintiff's goods under it, the jury negativing fraud in the appointment of the overseers:—Held, that the action was not maintainable; the appointment of the overseers being a judicial act, performed without fraud at a meeting competent in point of jurisdiction to perform it, and the act being verified by a sufficient number of signatures to satisfy the statute regulating the mode of appointment.

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petty session would be held on the 6th April, 1837, for the purpose of appointing two overseers for the borough, the two Slades, Captain Festing, and Messrs. Parrott, Seager, Clarke, and Brice attended. The mayor, Slade the elder, produced a list containing four names recommended by the vestry as persons eligible to serve the office, and stated that he should appoint Custard and Sydenham, the two whose names stood first upon the list. Mr. Parrott objected that the list was an unfair one, all the individuals being of one political party (professing the like political principles with the mayor); and he proposed that one person of each party, selected from a list of twelve, should be appointed. This proposition met with the concurrence of Messrs. Seager, Clarke, and Brice. Whilst, however, these gentlemen were discussing the matter, the mayor (unobserved by them) produced from his pocket two blank forms of appointment, with seals attached, and, after signing them himself, handed them to Slade the younger, who sat next to him; the latter also signed, and handed the instruments to his neighbour, Captain Festing, who, having signed, returned them to the mayor. The mayor then gave them to the high constable who was in attendance, with instructions to serve the parties immediately.

This being done, the other two magistrates, Colonel Pedler and Mr. Rickman, entered the room. Mr. Parrott (in ignorance of what had passed) then proposed that two persons, Busson and Short, one of each political party, selected from the extended list, should be appointed. This was seconded by Mr. Seager. The mayor thereupon observed—"You are too late: I have already made the appointment; and the high constable has gone to serve the parties."

At the instance of Mr. Parrott, the magistrate's clerk proceeded to take the votes, when Messrs. Parrott, Seager, Clarke, Brice, Rickman, and Colonel Pedler, voted for Busson and Short: the two Slades and Captain Festing

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declining to vote. It appeared that it was the duty of the magistrates' clerk to provide, and that he had on this occasion provided himself with the blank forms of appointment.

The evidence as to the manner in which the mayor had conducted himself in the business was conflicting. The plaintiff's witnesses describing the manœuvre to have been performed with great dispatch and secrecy. One of the witnesses, the assistant to the magistrate's clerk, stated that the mayor shortly after the transaction observed to him—"I did not expect to have got through it so well: nobody saw me but you; and I thought you would have spoken." The defendants' witnesses, on the other hand, averred that the mayor acted openly and with deliberation. Among these were Captain Festing, and Arnold, the town clerk: the former stated that no objection was made until after he had signed the appointments, and the mayor was in the act of giving them to the high constable; and the latter stated that Mr. Parrott's objection was not made until after the documents were in the high constable's hands, and that Colonel Pedler and Mr. Rickman did not enter the room until about ten minutes afterwards.

Application was made in May following this transaction to the magistrates of the borough to issue warrants against the plaintiff and others for non-payment of a poor-rate made by Custard and Sydenham, the overseers so as above appointed. The majority declined to issue them. A warrant (amongst others) was afterwards issued by the two defendants against the plaintiff, whose goods were seized and sold under it: whereupon he brought the present action.

On the part of the plaintiff, it was contended that the appointment of Custard and Sydenham being fraudulent and illegal, the rate made by them was invalid and incapable of being enforced.

On the other hand, it was submitted that there was no

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fraud in the appointment of the overseers; and that the rate made by them was conclusive and binding unless quashed upon appeal.

His lordship left it to the jury (a special jury) to say whether the appointment of overseers had been made fraudulently or not: telling him, that, if they were of opinion that it was, the appointment was void, and their verdict must be for the plaintiff; but that, if they thought the appointment had been made bonâ fide, and without any fraudulent intention, the verdict must be for the defendants.

The jury, after deliberating a short time, returned a verdict for the defendants.

Crowder, in Easter Term last, moved for a rule nisi for a new trial, on the grounds of misdirection, and that the verdict was against evidence.—The learned Chief Justice erred in leaving the question to the jury singly and simply as a question of fraud; for, the appointment would be illegal, whether the parties acted fraudulently, or merely in ignorance of their duty. The absence of conference and deliberation on this, which is a *judicial*, and not a mere *ministerial* act, clearly rendered the appointment void. In *The King* v. *Forrest*, 3 T. R. 38, it was held, that, where an act of parliament empowers two justices of the peace to execute a judicial act, they must meet and execute it together; and therefore an appointment of overseers under the 43 Eliz. c. 2, signed by two justices separately, is bad. "Perhaps," said Lord Kenyon, "at this time of day no great inconvenience would follow from permitting the appointment to be made by a single magistrate. But we are to decide this question on the statute 43 Eliz. c. 2; the first section of which expressly declares that the overseers shall be nominated by two or more justices of the peace, *whereof one shall be of the quorum*. Now, those words are very material in the decision of a question arising upon this

statute. For, though in modern times all the justices in the commission (except one) are of the quorum, yet at the time when that act passed some persons were selected on account of their superior knowledge, and appointed to be of the quorum. However, I do not wish to decide on that sort of argument. But it is admitted that in the case of orders of removal they must act together, and for this reason, that they should assist each other, and that the result of their conference should be the ground of their determination. Now, I cannot distinguish this case from that. This is not merely a *ministerial* act: if it were, like signing a rate, that might perhaps vary the question: but it is a *judicial* act, wherein the justices are to exercise a discretion. And in order to make this a good appointment, the justices should have acted together." Ashhurst, J., said: "The justices in appointing overseers do not act ministerially; the statute has vested a discretion in them, and they should act together. And, it being a matter of discretion, they should confer together for the purpose of a communication on the subject-matter on which they are to determine: but this cannot be done when they are not together, and when no conference can take place." And Grose, J., added: "I agree that the justices should be together when they sign the appointment. This is not a mere ministerial act; if it were, the justices would have nothing more to do than to confirm the appointment presented to them by the parishioners: but they are to exercise a discretion upon the subject. And the general rule is, that, when an act of parliament requires the concurrence of two magistrates, they should both act together. This point has been determined not only in the case of orders of removal, but in orders of bastardy also, in *Billings* v. *Prinn*, 2 Bl. Rep. 1017, in the court of Common Pleas." So, in *The King* v. *The Inhabitants of Hamstall Ridware*, 3 T. R. 380, it was held that an indenture of a parish apprentice assented to by the two justices *separately* was void; and no settlement was gained

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by serving under it. Lord Kenyon there said: "Perhaps the rule requiring the concurrence of two magistrates at the same time may be sometimes attended with inconvenience. But the rule has been long settled to be that the concurrence of justices together is not necessary where the act to be done is merely *ministerial;* but they must confer together and form a joint opinion where the act is of a *judicial* nature." And Ashhurst, J., said: "The act of the justices in this case is in its nature an act of judgment." An appointment, therefore, made without opportunity for deliberation, and without the concurrence of the majority of the magistrates present, was clearly illegal; they having met in petty session for the special purpose of making the appointment. [*Tindal*, C. J.—This is rather a question of law arising on the evidence, than matter of misdirection.]

The facts disclosed in evidence not only warranted the inference, but imperatively called upon the jury to infer, that the conduct pursued by the defendants was the result of a predetermination to steal a march upon their brother magistrates.

A rule nisi having been granted—

Wilde and *Bompas*, Serjeants, and *Barstow*, in Trinity Term, shewed cause.—The weight of evidence clearly preponderated in favour of the validity of the appointment. There was no proof that the persons appointed were not in every respect, save as to their political principles, fit and eligible persons; nor was there any evidence that their appointment was the result of any preconcerted scheme.

It is said that the learned judge should have told the jury, that, unless the appointment was made with the concurrence of the majority of the magistrates present, and after opportunity afforded them for deliberation, it was illegal and void. There was, however, a submission of the first two names on the list presented by the vestry to the meeting; and, no objection having been made at the time,

can it be afterwards said that the majority did not concur? That there was reasonable time for objecting, is clear: indeed, part of the plaintiff's case is, that the objection *was* urged, and that the appointment was made in defiance of the objection. There clearly was no ground for contending that it should have been left to the jury to say whether sufficient opportunity for deliberation had been afforded or not.

The appointment is made in compliance with the terms of the statute: and it is a judicial act—*Waite* v. *Stokes*, Godb. 280; *Swan* v. *Broome*, 3 Burr. 1595; *Rex* v. *Forrest*, 3 T. R. 38 (81). What is the consequence of want of deliberation, or of any other malfeazance of a judicial act? It is perfectly clear and undoubted law that no action is maintainable against one for an act done by him in a judicial character. And there is in this respect no distinction in rank or degree amongst judicial persons: Lord Coke, in *Floyd & Barker's* Case, 12 Rep. 23, mentions justices of the peace amongst those that are exempt from liability for acts done by them in a judicial capacity. In *Brittain* v. *Kinnaird*, 1 B. & B. 432, 4 Moore, 50, it was held, that, where a justice of the peace has jurisdiction, his conviction is conclusive evidence of the facts stated in it, if no defect appear on the face of it: therefore, where in an action of trespass against two justices for seizing and detaining a decked and registered vessel on the Thames, having gunpowder on board, under the bumboat act, 2 Geo. 3, c. 28: it was held that the owner could not be let into evidence to shew that she was not a boat within the meaning of that statute. Dallas, C. J., there says: "Much

(81) The appointment is to be made *under the hand and seal of two or more justices*, that is, out of Quarter Sessions; for, the Quarter Sessions have no power to make it: the reason whereof is, that the courts (of Quarter Sessions) have the determination of appeals against the appointment, and, if they had also power to make the appointment in the first instance, there could be no appeal but ab eodem ad eundem. *Rex* v. *Flugg*, 1 Sess. Ca. 260, 1 Bott, 16.

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has been said about the danger of magistrates giving themselves jurisdiction, and extreme cases have been put, as of a magistrate seizing a ship of seventy-four guns, and calling it a boat. Suppose such a thing done, the conviction is still conclusive, and we cannot look out of it. It is urged that the party is without remedy; and so he is, without civil remedy, in this and many other cases; his remedy is by proceeding criminally; and, if the decision were so gross as to call a ship of seventy-four guns a boat, it would be good ground for a criminal proceeding. Formerly the rule was to intend every thing against a stinted jurisdiction; that is not the rule now; and nothing is to be intended but what is fair and reasonable: and it is reasonable to intend that magistrates will do what is right." In *Basten* v. *Carew*, 5 D. & R. 558, 3 B. & C. 649, a record of proceedings under the statute 11 Geo. 2, c. 19, s. 16, which gives a summary remedy to landlords whose tenants have deserted their premises with rent in arrear, and no sufficient distress, drawn up conformably to the statute, was held to be a complete defence to an action of trespass against two magistrates for turning a tenant out of possession under the act. And Abbott, C. J., said: "I take it to be a general rule and principle of law, that, where justices of the peace have an authority given to them by an act of parliament, and they appear to have acted within their jurisdiction, and to have done all that the particular statute required them to do in order to originate their jurisdiction, their conviction drawn up in due form, and remaining in force, is conclusive evidence for them in any action which may be brought against them for the act so done." So, in *Ashcroft* v. *Bourne*, 3 B. & Ad. 684, where two magistrates had, at a landlord's request, given possession of a dwelling-house as deserted and unoccupied, pursuant to the same statute, and the judges of assize of the county, on appeal, made an order for the restitution of the farm to the tenant, with costs; and the latter brought an action of trespass for

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the eviction, against the magistates, the constable, and the landlord: it was held that the record of the proceedings before the magistrates was an answer to the action on behalf of all the defendants. Littledale, J., there says: "The justices here acted according to the directions of the statute 11 Geo. 2, c. 19, s. 16, and, considering, upon their view of the premises, that they were deserted, gave possession to the landlord. In so doing they acted as judges of record, and though on appeal the judges of assize of the county palatine of Lancaster directed restitution with expenses and costs, that was at most but equivalent to reversing a judgment on writ of error." In *The Earl of Radnor* v. *Reeve*, 2 B. & P. 391, it was held, that, if the judgment of commissioners of appeal in certain cases be declared final by statute, their judgment cannot be questioned in an action of trespass. So, in *Fawcett* v. *Foulis*, 1 M. & R. 102, 7 B. & C. 394, it was held that no action lies against justices for a distress under a conviction for not doing statute labour on the highways, where, by reason of the plaintiff's occupying land within the parish, the magistrates have jurisdiction. And see to the same effect *Strickland* v. *Ward*, 7 T. R. 631, 633, in notis, *Lowther* v. *The Earl of Radnor*, 8 East, 113, and the authorities collected in 2 Starkie on Evidence, 239. No action will lie against a coroner (being a judge of a court of record) for an act done by him in his judicial capacity—*Garnett* v. *Farrand*, 6 B. & C. 611, 9 D. & R. 657: so, where a sheriff issues a a warrant of execution in his judicial character, as judge in a county court, he is not liable for the act of his bailiff, in taking the goods of a wrong person—*Tinsley* v. *Nassau*, M. & M. 52, 2 C. & P. 582. *Harper* v. *Carr*, 7 T. R. 270, is an express decision that the granting of a warrant of distress for a poor-rate is a judicial and not a ministerial act. It clearly is not competent to the plaintiff in an action of this sort to discuss the validity of the appointment of the overseers by whom the rate was made.

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If such appointment had been illegal, the question might have been raised by appeal to the Quarter Sessions, or by certiorari in the Queen's Bench: and, if found bad, the rate would have been quashed or the appointment vacated: it might be voidable, but it certainly was not void—*The King* v. *The Inhabitants of Great Marlow*, 2 East, 244 (82). In *The King* v. *The Inhabitants of Stoifold*, 4 T. R. 596, it was held that an order of removal signed by two justices separately and in different counties, is only voidable, not void, and the parish wishing to avoid it must appeal to the next sessions. Great inconvenience would result, and few would encounter the hazard, if the validity of acts of a judicial nature could, in the absence of fraud or other misconduct, be inquired into in this way—if judges (of whatever degree) were held liable to actions for acts done by them in their judicial capacity. The fact of the warrant having been granted by two of the magistrates who signed the appointment, makes no difference. [*Tindal*, C. J.—Nothing turns on that: the simple question is whether the rate is a valid rate or not. *Coltman*, J.—Even supposing the jury had affirmed the fraud, I doubt whether the appointment would be more than voidable.]

Crowder, *Bingham*, *Butt*, and *Newman*, in support of the rule.—The appointment of overseers is undoubtedly a judicial act—*The King* v. *Forrest*, 3 T. R. 38: it is an act that requires conference; consequently the appointment in question was not made by the magistrates in the due and proper exercise of any jurisdiction in them. It may be conceded, that, where magistrates have jurisdiction, their decision, *being matter of record*, is, when not bad upon the

(82) To avoid mere technical objections, it is enacted by the 17 Geo. 2, c. 38, s. 8, that the distress for the poor-rate shall not be deemed unlawful for any defect or want of form in the warrant for the appointment of overseers.

Money collected under a quashed rate, is, by the 41 Geo. 3, c. 23, s. 1, to be placed to the account of the next valid rate.

face of it, final and conclusive. This is the utmost extent to which the cases cited on the part of the defendants go. *Brittain* v. *Kinnaird*, *Basten* v. *Carew*, *Ashcroft* v. *Bourne*, *The Earl of Radnor* v. *Reeve*, *Fawcett* v. *Foulis*, *Strickland* v. *Ward*, *Lowther* v. *The Earl of Radnor*, *Garnett* v. *Ferrand*, and *Tinsley* v. *Nassau*, were all cases of *records*: and that circumstance was mainly relied upon in some of them, and particularly in *Basten* v. *Carew*. But there is no pretence for saying that this warrant of distress is a record.

All acts of judgment required of two or more persons must be done by them together; as, to examine witnesses to ground an order of removal—*Rex* v. *The Inhabitants of Coln, St. Aldwin's*, Burr. S. C. 136; to ground an order of bastardy—*Billings* v. *Prinn*, 2 W. Blac. 1017. In *The King* v. *Forrest*, 3 T. R. 38, though it was stated that the magistrates did not *sign* the appointment of overseers of the poor together, yet the other facts of the case and the judgment of the court shew that the substantial objection was, not that they were not together when the mere act of signing was done, but that they did not deliberate and concur together upon the propriety of the appointment. And such was the nature of the objection in *Rex* v. *The Inhabitants of Great Marlow*, 2 East, 244. In *Battye* v. *Gresley*, 8 East, 319, it was held that the granting a warrant by commissioners of bankrupt for the arrest of a witness in order to examine him, being an act of discretion, its propriety must be determined upon by the commissioners acting together at the time.

In *Nichols* v. *Walker*, Cro. Car. 394, which was an action of trespass for seizing the plaintiff's goods under colour of a warrant of distress for a poor-rate, it was submitted that the defendants, acting under the warrant of three magistrates, were excused: Sed non allocatur; "for, the rate being unduly taxed, the warrant of the justices of peace for the levying thereof will not excuse. And it is not like where an officer makes an arrest by warrant out of the

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King's court, which, if it be error, the officer must not contradict; because the court hath general jurisdiction. But here the justices of the peace have but a particular jurisdiction, to make warrant to relieve [levy] rates *well assest*." [*Coltman*, J.—There, the property rated was out of the parish.] In *Milward* v. *Caffin*, 2 W. Blac. 1330, it was held that a distress for a poor-rate for lands not in the occupation of the plaintiff, might be replevied, notwithstanding the Sessions on appeal had confirmed the rate; for, determining that a man may be assessed for what he does not occupy, is an excess of jurisdiction. The case of *Lord Amherst* v. *Lord Somers*, 2 T. R. 372, is expressly in point: there trespass was maintained against the justices signing an illegal warrant of distress for a poor-rate. *Stanley* v. *Fielden*, 5 B. & A. 425, is also a strong authority. There, two magistrates authorized the surveyor of a turnpike road which ran through twenty-nine townships, to collect for the repair of the road a composition in lieu of the statute duty. The surveyor was not examined upon oath as to the necessity of the composition. He afterwards made an assessment of six-pence in the pound upon the annual value of the lands of a particular township through which the turnpike road passed. The sum to be collected under the assessment was the utmost that the surveyor of the turnpike roads could in any case demand from the inhabitants of the township, and much exceeded what was required to put that part of the road lying in the township into complete repair. The turnpike surveyor having returned the assessment to the surveyor of the highways of the township, directed him to collect the sums therein mentioned. Upon a refusal by an inhabitant of the township to pay the sum assessed, two magistrates (two of the defendants) granted a warrant of distress to levy the same: and it was held that the warrant was bad, the magistrates having no jurisdiction whatever, upon the ground, that, in order to legalise the demand under the assessment, it ought to have been pre-

viously ascertained how many days' statute duty would be required to put the road into complete repair, the composition being demandable only in respect of that number of days' statute duty. Bayley, J., there says: "A magistrate is not to be answerable for granting a warrant, if at the time of granting it he has documents before him (*which are the acts of other magistrates*) from which it appears he was justified in granting the warrant. But, if the want of jurisdiction is manifest from all the proceedings before him at the time, then *he grants the warrant at his peril.*" Here, the majority of the magistrates having heard the matter, and declined to grant the warrant, these defendants acted at their peril. In *Weaver* v. *Price*, 3 B. & Ad. 409, trespass was brought against two magistrates for granting a warrant to levy poor-rates upon the plaintiff, he having no land in the parish in which the rate was made: and Lord Tenterden said: "There was not in this case any rate whereby the plaintiff could be duly assessed to the relief of the poor of the parish of Overton; for, in the result, it turned out that he was not an occupier of any land in that parish. That being so, the defendants had no authority to order any distress for a rate to be levied of his goods. They are therefore liable in trespass. In *Davis* v. *Capper*, 10 B. & C. 28, 5 M. & R. 53, trespass was held to be maintainable against a magistrate for exceeding his jurisdiction by signing a warrant of commitment for re-examination for an unreasonable time, though he acted bonâ fide. So, here, the parties who made the appointment of the overseers acted beyond the scope of their jurisdiction; the rate made by the officers so improperly appointed was a void rate; and the warrant of distress issued for the levying of that void rate, especially as it was granted by the very persons who had been guilty of the illegal act of appointment, was an illegal and void warrant. The court of King's Bench clearly would not have interfered by mandamus to compel the defendants,

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under the circumstances, to grant a warrant of distress—*The King* v. *Yarburgh Greame*, 2 Ad. & E. 615; *The King* v. *Morgan*, 2 Ad. & E. 618, n.; *The King* v. *Mirehouse*, 2 Ad. & E. 632. The statute 41 Geo. 3, c. 23, s. 1, has no application; it relates only to cases where the sole remedy is by appeal.

The present defendants, at all events, cannot be permitted to pray in aid their own fradulent and illegal act to bolster up the warrant. In *Strother* v. *Hutchinson*, 5 Scott, 346, 4 New Cases, 83, where the judge of a county court improperly nonsuited a plaintiff against his will, Tindal, C. J., says—"The last ground of objection is, that, inasmuch as the bill of exceptions is appended to the record, we are bound by the judgment of nonsuit—that the plaintiff must be taken to have assented to the nonsuit, and cannot be heard in contradiction to the record. That, however, is setting up as an answer to the plaintiff's complaint the very matter of which he complains, and falls within the maxim, 'Exceptio ejus rei cujus petitur dissolutio nulla est.' So, here, the plaintiff complaining that the judge of the county court refused to let the case go to the jury, I think it is not competent to the defendant to say, that, as it appears by the record that he has been nonsuited, he cannot now be heard to controvert the fact." The defendants here are setting up as their justification the very thing the legality of which is impeached.

The inconvenience that may result from holding that judicial acts of this description may be inquired into, and their validity discussed, will be infinitely less than that which a contrary decision will give rise to. It will be no hardship to hold that individuals who voluntarily take upon themselves the duties of magistrates are responsible for acts of misconduct.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—This was an action of trespass for seizing the goods of

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the plaintiff under colour of a warrant signed by the defendants (who were magistrates of the borough of Poole—one of them being the mayor), for the purpose of enforcing payment of a poor-rate, which was alleged by the plaintiff to be a void rate, on the ground that the overseers by whom it was made had not been duly appointed, but that their appointment was void.

Upon the trial of the cause, at the last Spring Assizes for the county of Dorset, before Lord Denman, it was proved that a notice had been duly given for holding a meeting of the magistrates for the purpose of appointing overseers. The meeting was attended by the mayor and six other magistrates, in the first instance; and two others came in afterwards, though at what particular period they arrived did not very clearly appear.

The appointment in question was signed at this meeting by the mayor and two others of the magistrates, and was immediately issued to the parties thereby appointed; and it was contended at the trial that this appointment was fraudulently and surreptitiously made by the magistrates who signed it, without the concurrence of the others who were present at the time, and met for the purpose of making the appointment, and without opportunity afforded them for deliberation.

The question of fraud was left by Lord Denman to the jury, who found a verdict for the defendants, thereby negativing the fraud imputed to them. A rule nisi was obtained in the following term for a new trial, on the ground of misdirection, or, in the alternative, as upon a verdict against evidence.

The ground on which the charge was impugned for misdirection, was this:—The plaintiff contended that the magistrates having assembled for the purpose of appointing overseers, which is a judicial act (*Rex* v. *Forrest*, 3 T. R. 38), the jurisdiction of the whole assembled body had attached, and that no appointment could be valid unless a majority

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of the assembly concurred in its being made, and that the jury ought to have been told, that, even if there was no fraud, yet if, through ignorance of their duty, an appointment was made by some of the assembled magistrates without the concurrence of the majority, or opportunity afforded to the majority for deliberation, the appointment was void for want of jurisdiction; and that the point for them to consider was, whether the appointment had been made with the concurrence of the majority, and after opportunity for deliberation.

If this objection is to prevail, it is difficult to say how far it will extend. Is it necessary that the magistrates should express their opinions in words, or will a silent assent be sufficient? Would it be allowable, in such a case as the present, for the plaintiff to go into evidence that such or such a magistrate voted against the appointment, but was misheard, or that the number of persons who had given their opinions was miscounted, or that some of the magistrates had been engaged in other matters, and had not been aware when the question was put?

In the case of *The King* v. *The Justices of Leicestershire*, 1 M. & S. 442, which arose out of an appeal against an order of removal, the court of Quarter Sessions had been equally divided; but, through a mistake in reckoning the numbers, judgment was entered for quashing the order. An application was made to the court of King's Bench for a mandamus to the justices to enter continuances on the appeal to the next Quarter Sessions, and then to hear and determine the same. But the court, on cause shewn, refused the mandamus, considering that a judgment having been entered in the court below, the court of King's Bench could not (as was said by Lord Ellenborough) hold a sort of balloting-box to ascertain the voices that were given, or whether they were correctly cast up.

Now, this was a judgment confessedly wrong, entered up without any legal authority in any one to enter it, yet, as

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long as it remained unquashed on the files of a court which had a jurisdiction over the subject-matter, the court could not treat it as a nullity. This case seems to furnish an analogy sufficient for the determination of the present case. Here is a judicial act performed without fraud, at a meeting which was competent in point of jurisdiction to perform it, and that act verified by a sufficient number of signatures to satisfy the requisitions of the statute which directs the appointment to be made. We think, therefore, that it cannot be questioned in this collateral way on the ground of an irregularity or miscarriage in ascertaining the sentiments of the meeting.

We have the less hesitation in coming to this conclusion, because the law has provided appropriate methods of settling such a question. The appointment may be directly questioned by an appeal to the Sessions, or, if there is any impropriety in the mode of the appointment, it may be set aside by a direct application for that purpose to the court of Queen's Bench—*Rex* v. *The Overseers of Bridgewater*, Cowp. 139. It is obviously a much more convenient course that the validity of the appointment should be brought into controversy in a direct way immediately upon the appointment, than that a party should lie by until a rate has been made and levied, and should then be allowed to revert back to some miscarriage in the appointment. No objection arising in such a way ought to prevail, unless it rests on the most solid ground, which, in our judgment, the present objection does not.

With respect to the alternative branch of the rule for a new trial, on the ground that the verdict was against evidence, we consider the case as being one peculiarly for the determination of the jury; and we should be very slow to grant a new trial in a case of imputed fraud, where the jury have negatived the fraud, especially in a case where the plaintiff has declined the direct mode of questioning the appointment provided by the law for that purpose, and has

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himself selected a tribunal very inconvenient, if not oppressive, to the defendant.

Upon these grounds, we think the rule which has been obtained for a new trial should be discharged.

Rule discharged.

Friday, Feb. 8th.

A loan upon usurious interest secured by the deposit of a lease and a warrant of attorney, is not brought within the protection of the 1 Vict. c. 80, by the addition of a promissory note as a further security.

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BY the statute 7 Will. 4 & 1 Vict., c. 80, an act to exempt *certain* bills of exchange and promissory notes from the operation of the laws relating to usury, reciting, that, by an act passed in the 4 Will. 4 (c. 98, s. 7), bills of exchange and promissory notes made payable at or within *three* months after the date thereof, or not having more than *three* months to run, and certain transactions in respect of such bills, were exempted from the operation of the statutes relating to usury, and that it was desirable to extend such exemptions, it is enacted, "that, from and after the passing of this act, and till the 1st January, 1840, no bill of exchange or promissory note made payable at or within *twelve* months after the date thereof, or not having more than *twelve* months to run, shall by reason of any interest taken thereon or secured thereby, or any agreement to pay or receive or allow interest in discounting, negotiating, or transferring the same, be void; nor shall the liability of any party to *any* bill of exchange or promissory note (83) be affected, by reason of any statute or law in force for the prevention of usury; nor shall any person or persons, or body corporate, drawing, accepting, indorsing, or signing *any such* bill or note, or lending or advancing any money, or taking more than the present rate of legal interest in Great Britain and Ireland respectively for the loan of money on *any such* bill or note, be subject to any penaltie

(83) See Vallance v. Siddel, 6 Ad. & E. 932, 2 N. & P. 78.

under any statute or law relating to usury, or any other penalty or forfeiture; anything in any law or statute relating to usury, or any other law whatsoever in force in any part of the United Kingdom, to the contrary notwithstanding."

Wilde, Serjeant, on the 23rd April last, on behalf of the defendant, obtained a rule calling on the plaintiff to shew cause why the judgment signed on the warrant of attorney in this cause, and all subsequent proceedings had thereon, should not be set aside; and why the plaintiff should not pay to the defendant or his attorney his costs of and occasioned by such judgment, together with his costs of the application. This rule was drawn up on the affidavit of the defendant and one William Kightley.

On a subsequent day (May 10th), *Erle* appeared for the purpose of shewing cause, when, at the suggestion of the court, the following rule was entered into, by consent:—

"That a special case be stated between the parties, to be argued by counsel on both sides, pursuant to the statute 3 & 4 Will. 4, c. 42, s. 25; in which case the affidavits of W. H. Austin and W. S. Masterman, and also the affidavits on which the rule of the 23rd April was obtained, are to be set forth; and the court is to draw such inferences of fact therefrom as a jury might have done if the matters of such affidavits had been in evidence at Nisi Prius; that upon such security being given by the defendant to the plaintiff as shall be approved by one of the Masters of this court, in case the parties differ about the same,) the effects taken in execution in this cause shall remain in their present place and state until this court shall otherwise order, and the man now in possession of the said effects under the said execution be withdrawn; but with liberty to the plaintiff to re-enter, and take possession of the said effects under the said writ of execution, or a further writ if necessary, in the event of the judgment of the court being given

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for the plaintiff on the hearing of the special case: the rule of the 23rd April, in the meantime, to stand enlarged."

A case was accordingly stated pursuant to the rule of the 10th May, in which the respective affidavits were set out to the following effect:—

Defendant's affidavits.

On the part of the defendant it was sworn, that, in August, 1837, he applied to the plaintiff's attornies for a lease of 150*l.* *upon the security of certain leasehold premises* which he had proposed to mortgage; that, on the 20th August, a clerk of the plaintiff's attornies was sent to inspect the premises, and it was then agreed that the defendant should give 15*l.* for the loan of 150*l.*, to be repaid at four, eight, and twelve months from the time of the advance, by three equal instalments, to be secured by a deposit of the lease of the defendant's premises and a warrant of attorney, *and a promissory note as a collateral security;* that the money was accordingly advanced on the 1st September, the plaintiff retaining 15*l.* for the interest, and the defendant depositing his lease and executing a warrant of attorney for 300*l.*, and signing a promissory note for 150*l.*; that the defendant also paid the attornies' costs, amounting to 8*l.* 9*s.* 3*d.*, the bill containing charges for taking down particulars of the "security" offered for the loan—attending the plaintiff and explaining the "security," when he agreed to advance the money upon the terms proposed—and for drawing and ingrossing the warrant of attorney, drawing the note of hand, &c.; and that, default having been made in payment of the first instalment, the plaintiff signed judgment and issued execution.

Plaintiff's affidavits.

On the part of the plaintiff, it was sworn, that the defendant had proposed to borrow the money on the security of his note of hand, and, it appearing that he had a lease of the premises occupied by him, it was agreed *that this lease should be deposited as a collateral security*, and that the defendant should execute a warrant of attorney to

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secure the due payment of the note; that, upon handing over the lease to the plaintiff, the defendant signed a memorandum stating that it was deposited "to secure the due and punctual payment of the sum of 150*l.*, being the amount of his note of hand in the plaintiff's favour bearing even date with the memorandum, and for which note he had also executed a warrant of attorney further to secure the payment of the 150*l.*"

The defeasance of the warrant of attorney stated that it was executed "to secure to the plaintiff the payment of 150*l.*, being the amount of a promissory note made by the defendant in favour of the plaintiff."

The case came on for argument in the last term.

Erle, for the plaintiff.—The money being lent upon the promissory note, and the warrant of attorney and deposit of the lease being a mere collateral security for the due payment of the note, there is nothing to take the case out of the protection of the statute. In *Connop* v. *Meaks* (or *Yeates*), 2 Ad. & E. 326, 4 N. & M. 302, the statute 3 & 4 Will. 4, c. 98, s. 7 (of which the statute now in force is merely an extension), which protected bills of exchange payable at three months or less from the operation of the usury laws, was held to extend also to warrants of attorney given to secure payment of such bills. And Lord Denman, C. J., said: "To hold the case not within the clause referred to, would in a great measure render the enactment nugatory. The words are, 'nor shall the liability of any party to any bill of exchange or promissory note be affected by reason of any statute or law in force for the prevention of usury.' That may be confined to bills drawn at not more than three months: but the liability on this warrant of attorney is a liability to such a bill; and, if we decided here that the usury laws attached, as they would have done before this statute, the liability' of a party to a bill of exchange at three months

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would 'be affected' by reason of the laws in force for the prevention of usury." [*Vaughan*, J.—In that case the warrant of attorney was not given at the same time as the bills. How was the plaintiff's security here bettered by the promissory note?] The promissory note was a negotiable security. The uniting of two securities does not invalidate the transaction: and what is the difference between the giving the warrant of attorney and the note simultaneously, and the giving the former at a subsequent period? In *Ex parte Knight, in re Pownall*, 1 Deac. 459, a creditor having advanced money to a bankrupt by discounting bills payable within three months from the date, and on the security of a deposit of goods, and having taken more than 5*l.* per cent. for the discount, it was held that the transaction was protected by the 3 & 4 Will. 4, c. 98, s. 7, and that the contract was not usurious. [*Bosanquet*, J.—Do you admit that the deposit of the lease was void on the ground of usury?] For the purpose of the present argument, that may be conceded. The liability on the note cannot be affected by the circumstance of the lease being deposited at the same time. The note being valid, the plaintiff, in enforcing the warrant of attorney, is seeking to avail himself of a liability incurred by means of the note; for, it is only on default in the due payment of the note, that the warrant of attorney is called into operation. It is precisely the same as if the warrant of attorney had not been given until after default had actually been made.

Petersdorff, for the defendant.—The statute applies only to advances made upon negotiable securities: it speaks of agreements "to pay or receive or allow interest in discounting, *negotiating*, or *transferring*" bills or notes, and of "*drawing, accepting, indorsing*, or signing any such bill or note;" securities that are not negotiable or transferable, are not within its protection. It is admitted on the

part of the plaintiff that the contract is illegal as to part; but it is sought to give effect to the rest of it—assuming that the court has power to sever an indivisible contract. The primary object of the parties here clearly was, the negotiation of a loan upon a deposit of the lease. Taking the fact to be that the three securities were given simultaneously, how does it appear that this was not a loan upon other than a promissory note? No case can be cited where one part of an entire contract has been upheld, the rest being illegal. In *Roberts* v. *Trenayne*, Cro. Jac. 507, in trespass de clauso fracto, it was found by special verdict that one Cory was seised in fee of the land in question, and that it was agreed that one Mary Adington should lend him 150*l.*, and for the security of the re-payment thereof Cory leased to Mary Adington this close, for sixty years, to commence at the end of two years, upon condition that if he paid the 150*l.* at the end of two years the lease should be void; and it was further agreed betwixt them, that Cory, for the deferring and giving day of payment of the said 150*l.* for two years, should pay unto the said Mary for interest yearly 22*l.* 10*s.* quarterly, if the said Mary should live so long; that, in performance of this agreement, she lent Cory 150*l.*, and he made the lease for sixty years, and granted by fine to Mary Adington an annual rent of 22*l.* 10*s.* to be paid quarterly, and afterwards conveyed the inheritance to the plaintiff; that the 150*l.* was not paid; and that Mary Adington took to husband Trenayne, who entered for non-payment. The first question was, "whether it were an usurious contract within the statute (12 Anne, st. 2, c. 16), because it was a mere casual bargain; for, if she die before any day of payment of the rent, the rent was gone, and yet he should retain the 150*l.* for two years, and pay nothing for it: and it was resolved that it was an usurious bargain, for by intendment she might live above two years, and it is an apparent possibility that she should receive that consideration whereby she is within the

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statute. *Clayton's* Case, 5 Rep. 70. Secondly, it was moved, whether this lease, being taken for the payment of the principal money, and not for the payment of any part of the usury, be within the statute, to make the bargain void: and it was resolved that it is, because it is for the security of money lent upon interest, and for the security of that which the statute intends he should lose; for, otherwise it would be an evasion out of the statute, that he would provide for the securing of the payment of the principal, whatsoever usurious bargain was made; which the law will not permit." *Connop* v. *Meaks* was drily the case of a warrant of attorney given to secure the amount of certain bills of exchange which had been previously discounted by the plaintiff, and some of which were overdue and unpaid: and in *Ex parte Knight,* there had been a variety of discount transactions between the parties; the security of the goods was collateral only: the case stood wholly clear of the usury laws. It is said that the warrant of attorney has no other operation than that of giving effect to the liability primarily created by the note. But the question is, what was the intention of the parties, and whether the transaction was not illegal ab ovo. The plaintiff calls upon the court to apply the provisions of the statute to a different kind of security, and to a different class of persons, from those contemplated by the legislature. It is only upon the supposition that the note is valid that the warrant of attorney can be so: and, how could this note be valid, unless taken as a separate and independent security? The money in this case was advanced upon the security of something other than and besides the note, and therefore the transaction is not protected by the statute.

Erle, in reply.—If the court yield to the argument urged on the part of the defendant, they will be running counter to the plain intention of the legislature; and the only consequence of holding that increasing the value of the security

will invalidate the transaction, must inevitably be, that the rate of interest upon loans will increase in proportion.

Cur. adv. vult.

TINDAL, C.J., now delivered the judgment of the court:—This case comes before us on a rule obtained by the defendant to set aside a judgment signed upon a warrant of attorney given by him, and all subsequent proceedings thereon. The warrant of attorney was subject to a defeazance, by which it appeared to have been given to secure the due and punctual payment of the sum of 150*l.*, the amount of a certain promissory note given by Collis to Berrington, by three instalments of 50*l.* each. This note was dated on the 1st September, 1837, and the three instalments were payable at four, eight, and twelve months from the date; and it appeared from the affidavits on each side, that, at the time of the contract for the loan, it was agreed that the plaintiff should receive the sum of 15*l.* for the said loan, which agreement was afterwards carried into effect by the plaintiff paying to the defendant 135*l.* only at the time of the securities being executed by the defendant. But the affidavits raise also a disputed fact, upon which the whole question between the parties will turn: the affidavits on the part of the plaintiff alleging that the contract between the parties was for a loan of 150*l.* on the promissory note of the defendant, and that the security of a warrant of attorney and a deposit of a lease of the defendant's dwelling-house was but an after-thought, and no part of the original contract: the defendant's affidavits, on the other hand, alleging that the real contract was for a loan upon the security of the leasehold premises, and that the note was afterwards added for the purpose and as affording the means of avoiding the statute of usury.

Now, in this case, we are called upon by the parties, by their mutual consent, to draw such inferences of fact from

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the affidavits as a jury might do if the matters of such affidavits had been in evidence at Nisi Prius; and, after giving our full consideration to the subject, we are of opinion that the proper conclusion to be drawn from the evidence by a jury at Nisi Prius would be, that the loan was agreed upon and entered into between the parties as a loan upon the security of the deposit of the lease of the defendant's leasehold dwelling-house, and that the security of the promissory note and warrant of attorney were added to the security of the deposit, for the purpose of legalizing the demand of interest beyond five per cent.

We think such a transaction is not brought within the words of the statute of 3 & 4 Will. 4, c. 98, s. 7, or the 1 Vict., c. 80; those acts contemplating the case of interest taken upon or secured by a bill of exchange or promissory note, as the real and bonâ fide ground of the debt; and not extending, or meant to extend, to the case of a bill of exchange or promissory note given in addition to a security of another nature, not protected by the statute, upon which the debt was really contracted; for, if the latter case should be held to be comprised within the act, it would in effect nearly operate as a general repeal of the statute of usury, by enabling persons who had lent money upon mortgage at usurious interest to sue for and recover principal and interest upon a bill or note, though the mortgage security might be void; and even to enforce a valid security upon the land for the principal, if the usurious interest should not be reserved by the mortgage; and we think the case of *Ex parte Knight, in re Pownall*, 1 Deacon, 459, is clearly distinguishable from the present. The contract in that case was an express and specific contract of discount upon various bills of exchange, and nothing else: not at all varied or modified in its nature by reason of the lender having at the time collateral securities in his hands for the repayment of monies that might become due: but in this case the contract is of a loan upon the pledge of the title deeds. And

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in *Connop* v. *Meaks and Another*, 2 Ad. & E. 326, 4 N. & M. 302, the discount of the bills of exchange being legalized by the statute 3 & 4 Will. 4, c. 98, there could be no reason why a warrant of attorney given subsequently as a security for such legal debt, should not be valid also. But, as the loan in the present case was not in our opinion really made upon the security of the promissory note, the discount taken makes the debt invalid; and consequently we think the warrant of attorney given for such illegal debt is invalid also.

Rule absolute.

UPWARD *v.* KNIGHT.

Saturday, Feb. 9th.

THIS was an action of assumpsit wherein the plaintiff sought to recover 10*l.* for goods sold and delivered, 10*l.* for money lent, and 10*l.* found due upon an account stated.

The formal commencement of 'actionem non' is necessary in a plea to part of the cause of action, whether pleaded in *bar* or only to the *further maintenance* of the particular part to which it is pleaded.

The defendant pleaded—first, non assumpsit—secondly, that 10*s.*, parcel of the sum claimed, was claimed on the sale of spirituous liquors—thirdly, that, at the time of the commencement of the suit, the plaintiff was indebted to the defendant in 20*l.* for work and labour, 20*l.* for money paid to his use, and 20*l.* upon an account stated between them, which several sums the defendant offered to set off—fourthly, that, upon an account stated between the plaintiff and defendant, the defendant allowed the plaintiff 2*l.* 13*s.* 4½*d.* due from the plaintiff to the defendant, and that, after such allowance, the defendant was indebted to the plaintiff in the sum of 76*l.*, which was paid before the commencement of the suit.

The plaintiff demurred to the second plea, assigning for cause, that, being pleaded to a part only of the cause of action, it did not commence with the allegation of actionem non, or conclude with a prayer of judgment. There was also a demurrer to the third plea, on the ground that it did

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not specify when or where the account was stated between the plaintiff and defendant; and to the fourth, on the ground, that, being pleaded to a part only of the cause of action, it did not commence with the allegation of actionem non, or conclude with a prayer of judgment, and also that it amounted to the general issue.

The defendant joined in demurrer.

As to the second and fourth pleas.

Chadwick Jones, in support of the demurrer.—In Stephen on Pleading, 3rd edit., 395, it is said: "A plea in bar, until the change of practice introduced by the recent rule of Hilary Term, 4 Will. 4 (84), had this commencement—'says that the said plaintiff ought not to have or maintain his aforesaid action against him the said defendant, because he says,' &c. This formula is commonly called actio. non. The conclusion was—'prays judgment if the said plaintiff ought to have or maintain his aforesaid action against him.' But, as these expressions were, from the great comparative frequency of pleas in bar, of almost continual occurrence, it was thought desirable, for the sake of brevity, to abandon altogether the use of formulæ which led to so much reiteration; and by the rule of court just mentioned it was accordingly provided, that, in future, it should not be necessary, where the plea is pleaded *in bar of the whole action generally*, to use any allegation of actionem non, or any prayer of judgment; but that a plea pleaded without such

(84) s. 9. "*In a plea* or subsequent pleading *intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of 'actionem non'* or to the like effect, *or any prayer of judgment;* nor shall it be necessary in any replication or subsequent pleading intended to be pleaded in maintenance of the whole action, to use any allegation of 'precludi non,' or to the like effect, or any prayer of judgment; *and all pleas*, replications, and subsequent pleadings, *pleaded without such formal parts as aforesaid shall be taken, unless otherwise expressed, as pleaded respectively in bar of the whole action*, or in maintenance of the whole action; provided that nothing herein contained shall extend to cases where an estoppel is pleaded."

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formal parts shall nevertheless be taken as pleaded in bar of the action" (85). Here the form of the second and fourth pleas shews that they are pleaded respectively to part only of the cause of action, and therefore they ought to have commenced and concluded as before the new rule. In *Bird* v. *Higginson*, 2 Ad. & E. 696, 4 N. & M. 505, it was held that the rule of Hilary Term, 4 Will. 4, above referred to, applies to a plea answering *the whole of one count*, though there are other counts which it does not answer. Here the second and fourth pleas are evidently pleaded only to *part* of a count or counts. And in *Phillips* v. *Roderick*, Exch., Easter Term, 1838, it was held, that, if a plea be pleaded in total bar of a particular part of a count, it is not requisite, in a replication specially replying to it, to commence with 'precludi non,' or conclude with a prayer of judgment.

As to the third plea.

The third plea is bad for the omission of any mention of time or place in that part of it which alleges a statement of an account between the parties. [*Tindal*, C. J.—An allegation of *place* is out of the question, in a plea.] In *Ferguson* v. *Mitchell*, 2 C. M. & R. 687, 4 Dowl. 513, and *Spyer* v. *Thelwell*, 2 C. M. & R. 692, 4 Dowl. 509, it was expressly held that a count stating that the defendant was indebted to the plaintiff on an account stated between them, is bad, on special demurrer, for want of an allegation of the time when the account was stated: it should be "on an account *then* stated between them." *Higgins* v. *Highfield*, 13 East, 407, and *Denison* v. *Richardson*, 14 East, 291, are authorities to the same effect.

Marshman, contrà—The formal allegation of actionem non is only necessary where the plea is in bar of the *further* maintenance of the action. In *Vivian* v. *Jenkin*, 3 Ad. & E.

(85) For a more full statement of the object of the change, see the Second Report of the Common Law Commissioners, p. 33—Appendix to Stephen on Pleading, 3rd edit., note 68.

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741, 5 N. & M. 14, the first count of a declaration in trespass was for breaking the plaintiff's close, and damaging certain chattels, on divers days &c.; the second was for damaging certain chattels, and destroying others, on one day. The first plea, to both counts, gave colour to the plaintiff, and made title in the defendant under a demise from the owner of the fee, as to the close mentioned in the first count, and justified his entry, and the trespass to the chattels as incumbering the close, not averring identity of the chattels in the two counts: the second plea, to the second count, alleged possession by the defendant of the close, and justified the trespass to the chattels as incumbering it. The replication to the first plea, so far as it related to the first count, traversed the demise; and, so far as the plea related to certain of the chattels mentioned in the second count, replied de injuriâ: and, so far as it related to other of them, replied excess: the replication to the second plea, so far as it related to certain of the chattels mentioned in the second count, replied de injuriâ; and, so far as it related to certain other of them, replied excess. There were separate formal conclusions to all the distinct parts of the replicatons: each commenced in form as a replication to the whole plea; and each in the part replying excess contained no prayer of judgment, but only a verification followed by an &c. On a special demurrer, assigning as one ground that replication did not pray judgment, Lord Denman, delivering the judgment of the court, said: "It may be a question, whether, as this part of the replication goes only to part of the plea, it would fall within the above rule [Hilary Term, 4 Will. 4, s. 9]; the inclination of our opinion is that it would; and that no prayer of judgment would be necessary." In *Putney* v. *Swann*, 2 M. & Welsby, 79, 5 Dowl. 296, the declaration contained one count on a bill of exchange against the acceptor, and a second count on an account stated: the defendant pleaded that he did not accept the bill of exchange in the declaration men-

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tioned, taking no notice of the count on an account stated. On a special demurrer to the plea, assigning for cause that it did not answer the whole of the declaration, Parke, B., thus explains the new rule: "The object of the 9th rule has been misconstrued, and I am satisfied it has no bearing on such a case as the present. Its object was to prevent unnecessary statements being made in the introductory parts of the pleadings. It is to be understood as applying to a plea pleaded in bar of the whole action, as contradistinguished from a plea in bar of the further maintenance of the action. It did not mean to affect the ordinary rules of pleading." [*Tindal*, C. J.—The rule says, that, in a plea intended to be pleaded in bar of the whole action generally, it shall not be necessary to use any allegation of 'actionem non,' or any prayer of judgment; and all pleas pleaded without such formal parts shall be taken, *unless otherwise expressed*, as pleaded in bar of the whole action. Now, in the case before us, it *is* otherwise expressed. How, then, can you avail yourself of the rule? *Bird* v. *Higginson* comes very near this case.—*Erskine*, J., referred to *Sharman* v. *Stevenson*, 1 C. M. & R. 75. There, to a declaration in indebitatus assumpsit for money had and received, and on an account stated, the defendant pleaded, "as to 25*l.*, parcel &c.," that the plaintiff ought not *further to maintain* his action, because the defendant brings into court here the sum of 25*l.* ready to be paid to the plaintiff: and the defendant further saith that the plaintiff has not sustained damage to a greater amount than 25*l.* in respect of the causes of action in the declaration mentioned as to the sum of 25*l.*, *concluding with a verification:* and, as to *the residue of the monies* in the declaration mentioned, the defendant pleaded non assumpsit. It was held, on special demurrer, that the plea as to the payment of money into court was ill for not concluding with *a prayer of judgment to the further maintenance of the action.*]

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As to the third plea.

As to the allegation of time—It has never been held necessary in a *plea* of set-off to specify when the alleged account was stated. *Ferguson* v. *Mitchell* and *Spyer* v. *Thelwell* were cases of *declarations:* and the other cases cited have no application. *Bennet* v. *Holbech*, 2 Wms. Saund. 319, n. (6). But, assuming such allegation to be necessary, the demurrer is too large: it should have confined itself to that particular defect; the plea is a good plea for the rest—*Spyer* v. *Thelwell.*

TINDAL, C. J.—I am of opinion that the second and fourth pleas in this case, being pleaded to part only of the cause of action, do not fall within the rule referred to. The objection to the third plea falls to the ground; for, there is at the beginning of the plea a reference to a specific time, viz. the time of the commencement of the action. The defendant may, however, amend his second and fourth pleas, on payment of costs; or the pleadings on both sides may be amended, *without costs.*

ERSKINE, J., concurring—

Rule accordingly.

IN THE EXCHEQUER CHAMBER.

HILARY VACATION, 2 VICTORIÆ.

PRESENT—LORD DENMAN, C. J., LORD ABINGER, C. B., LITTLEDALE, J., ALDERSON, B., AND PATTESON, J.

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Monday, Feb. 11th

JONES *v.* WAITE.

The execution of a deed of separation between a husband and his wife, which had been previously drawn up, is a legal consideration for a promise by a third party (a trustee) to pay money for which the husband was solely liable.

THE declaration stated, that, on the 19th October, 1833, the defendant signed a certain memorandum in writing whereby he agreed to and with the plaintiff that the time mentioned in a certain deed of separation for the said plaintiff's quitting a certain house at Holloway, should be extended to the 9th December next inclusive; and also to pay the plaintiff the sum of 160*l.* by eight half-yearly payments, towards Messrs. Horne & Gates's demand of 366*l.* 4*s.* 9*d.*, the said plaintiff taking the whole of such demand on himself, the payments to be made at the times of the payment of the annuity mentioned in the said deed of separation; and the defendant also agreed to pay 20*l.* towards liquidating certain outstanding debts at Rickmansworth, and also 220*l.* towards certain household expenses at Holloway, such last-mentioned sum of 220*l.* being divided into two payments, one half thereof being payable at Michaelmas-Day then next, and the other half at Lady-

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Day, 1835, and by the said memorandum in writing it was stated that the defendant agreed to the above in consideration of the plaintiff's executing the deed of separation, and agreeing to pay Messrs. Horne & Gates, and the household expenses and Rickmansworth debts, in full: and the plaintiff averred that he, confiding in the said agreement of the defendant, and in consequence thereof, was induced to and did then execute the said deed of separation in the said memorandum mentioned, that is to say, a certain deed of separation between the plaintiff and one Mary his wife, and agreed to pay the said Messrs. Horne & Gates in the said memorandum mentioned their said demand of 366*l.* 4*s.* 9*d.*, and the said household expenses and Rickmansworth debts, in full, and then took upon himself the payment of the said demands, debts, and expenses; whereof the defendant had notice: yet the defendant did not nor would perform the said agreement, but wholly neglected and refused (although often requested so to do) to make the first payment of the said sum of 220*l.* so agreed to be paid by the defendant towards the household expenses at Holloway aforesaid, which said first payment thereof, amounting to a certain sum of money, to wit 110*l.*, under and by virtue of the said agreement or memorandum in writing, became due and payable, and ought to have been paid by the said defendant at Michaelmas-Day last, and the same still remained wholly due and unpaid; and the plaintiff, by reason thereof, was forced and obliged to pay and was liable to pay the same out of his own monies: to the damage of the plaintiff of 120*l.*

Plea.

Plea—That, at the time of the supposed signing by the defendant of the supposed memorandum in writing in the declaration mentioned, and before and at the time of the commencing of this suit, the plaintiff was solely liable to make to the said Messrs. Horne & Gates the payments the supposed agreement by the plaintiff to make which was by the supposed memorandum in writing stated to be

n part the consideration for the defendant's agreeing as vas alleged to be in the said supposed memorandum in vriting agreed by the defendant; and that the plaintiff vas, at the said time of the supposed signing by the lefendant of the said supposed memorandum in writing, nd before and at the time of the commencing of this suit, olely liable to pay the said household expenses and Rick-nansworth debts in full, the supposed agreement by the laintiff to pay which household expenses and Rickmans-vorth debts in full was by the said supposed memorandum n writing stated to be in part the consideration for the lefendant's agreeing as was alleged to be in the said sup-osed memorandum in writing agreed by the defendant: nd this &c.

To this plea the plaintiff demurred specially for dupli-ity; and the defendant joined in demurrer.

The demurrer came on for argument in Easter Term, 1835, when the court of Common Pleas gave judgment for he plaintiff—see 1 Scott, 730, 1 New Cases, 656. The lefendant thereupon brought a writ of error, which came n for argument in the Exchequer Chamber on the 4th ebruary, 1836.

Ellis, for the plaintiff in error (the defendant below).—1. As to the cause assigned for special demurrer—The general principle is, that, if part of a consideration be nerely void, the contract may be supported by the residue f the consideration, if good per se—*Best* v. *Jolly*, 1 Sid. 8; *Cripps* v. *Golding*, 1 Rol. Abr. 30, *Action sur Case*, . 2; *Bradburne* v. *Bradburne*, Cro. Eliz. 149; *Coulston* v. *Carr*, Cro. Eliz. 848—second resolution; *Crisp* v. *Gamel*, Cro. Jac. 127; *Bret* v. *J. S. and his Wife*, Cro. Eliz. 755; Comyns's Digest, *Action upon the Case upon Assumpsit*, B. 13.); but, if any part of a consideration be illegal, it itiates the whole—*Fetherston* v. *Hutchinson*, Cro. Eliz. 99; *Bridge* v. *Cage*, Cro. Jac. 103; *Scott* v. *Gilmore*, 3 1. Duplicity.

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Taunt. 226; *Card* v. *Hope*, 2 B. & C. 661, 4 D. & R. 164. The effect of the plea is, to shew that the parts of the consideration pleaded to are void only, upon the principle that a promise by a party to do that which he is bound to do, is not an illegal consideration, but no consideration at all —*Harris* v. *Watson*, Peake, 72; *Stilk* v. *Meyrick*, 2 Camp. 217, 6 Esp. 129; *Barber* v. *Fox*, 2 Wms. Saund. 136, n. (2). If therefore the part of the consideration not pleaded to be merely void, it was necessary to avoid all the rest of the consideration, and there is consequently no duplicity in the plea.

2. Illegality of consideration.

2. If the part of the consideration not pleaded to be illegal, the question of duplicity does not arise, as the declaration is ill. It is submitted that it is not merely void, but that it is illegal. It amounts to this—that the plaintiff agrees, in consideration of a sum of money to be paid to him, to execute a deed of separation from his wife. Now, first, a husband cannot sell his consent to a separation. [The learned counsel was proceeding upon this point to urge again the arguments that were addressed to to the court below; but it was intimated to him by the court that it was unneceesary to discuss this general principle, seeing that it was in effect admitted by the court of Common Pleas.] Then, the question is, whether, if it be unlawful for a husband to sell his assent to a separation, it be lawful for him for a money consideration to execute a deed of separation. It is impossible to distinguish the two cases. The execution of the deed is a step in the transaction: if the whole transaction cannot be the subject of a contract, so neither can any part of it. Suppose the deed itself stated that which is here alleged, that the consideration for executing it was money paid to the husband, that unquestionably would vitiate the deed; or, suppose an action brought against the husband on this agreement, for not executing the deed, such action clearly must fail—*Worrall* v. *Jacob*, 3 Mer. 268; *Wilkes* v. *Wilkes*, 2 Dick. 791. It

was said in the court below that the argument of the defendant below proceeded upon the assumption that the parties were not already separated; which amounts to this—that the plaintiff below, on this record, may assume the fact of an antecedent separation. Now, this must rest either upon some allegation of the fact upon the record, or upon the absence of an allegation to the contrary. All that appears upon the face of the record, is, that a deed (unexecuted) of separation existed. No consent by the wife is alleged; nor any knowledge by her that the deed existed. And, as to the husband's consent, all that does appear, is, that he refused to execute the deed till induced to do so by the agreement to pay him money. How can an allegation that some one had drawn up a deed of separation which the husband refused to sign till paid for doing so, be considered as an allegation of the previous distinct fact of an agreement by the husband and wife to separate? If the record be so construed, and the fact be (as assumed on the part of the defendant) material, then a plea denying an agreement for separation antecedent to the agreement declared on, and concluding to the country, would be good. But such a plea clearly could not be supported. Then, can such an agreement to separate be presumed from the absence of a denial of it? Assuming, for the purpose of this part of the argument (on the grounds already insisted upon), that the declaration contains no allegation of the fact, did it lie on the defendant below to deny it? It is said that illegality will not be presumed; and that therefore every fact not inconsistent with the record will be assumed which could make the agreement legal. But no such rule of law exists. The utmost that can be said, is, that an allegation capable of a construction which will get rid of the illegality, will be so construed: but a distinct fact that is not alleged can never be imported into a record. Upon this principle, it would be impossible to frame a plea; for, the possibilities which might make the agree-

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ment lawful, could never be exhausted by negative allegations. It might be urged that the court would presume a divorce, that the parties had discovered that they were within the prohibited degrees, or that one of them had a wife or husband living, &c. The same principle might have been applied in almost every case where the agreement had been disallowed for illegality. Thus, *Fetherston* v. *Hutchinson*, Cro. Eliz. 199, is relied upon by the Lord Chief Justice of the Common Pleas, as shewing, that, if either part of the consideration be illegal, the whole falls to the ground. There, the judgment was arrested because a part of the consideration was the plaintiff's (a bailiff) allowing the defendant, whom he had taken, to go at large; which taking of money was contrary to the 23 Hen. 6, c. 10. But, if the defendant was already at large, this part of the consideration would be simply void. So, in *Hartley* v. *Rice*, 10 East, 22, many presumptions might have been imported justifying a restraint of the party from marriage. There, Lord Ellenborough said that it was agreed "that there might be reasonable grounds to restrain the party for that period. *But no circumstances are stated to us to shew that the restraint was reasonable*; and the distinct and immediate tendency of the restraint stamps it as an illegal ingredient in the contract." In *Lowe* v. *Peers*, 4 Burr. 2225, the defendant had covenanted to marry no one but the plaintiff. The judgment was arrested, though it was urged that the parties had probably agreed to marry each other. Lord Mansfield there said: "There is not the least ground to say that this man has engaged to marry this woman; much less does any thing appear of her engaging to marry him." The principle, if true, would apply to presumptions in evidence à fortiori: but the contrary was ruled in *Holland* v. *Hall*, 1 B. & A. 53, where Abbott, J., said: "If there be on the face of the agreement an illegal intention, is it too much to say that the burden lies on the party who uses expressions primâ facie importing an illegal

purpose, to shew that the intention was legal?" Every presumption which can be suggested here might have been made in *Brown* v. *Peck*, 1 Eden, 140, and *Tennant* v. *Braie*, Toth. 78. Besides, the legal presumption is, that parties who are husband and wife are living together in conformity with the general policy of the law. But, further, no such presumption as is suggested can cure the defect. If the parties had agreed to separate, and had actually separated, it would not have been the less illegal in the husband to sell his consent to a deed recognizing or affirming the separation. [*Alderson*, B.—You admit that parties may legally separate: why may not the doing what is legal be a good consideration?] If the separation be purchased, or any part of the transaction be the result of a pecuniary bargain, it is so far illegal. It is legal to vote for a candidate at an election; a promise to vote for a particular individual would not be a valid consideration for a promise to pay money. [*Alderson*, B.—That is a thing declared illegal by statute.] The principle is not confined to matters prohibited by statute. It is lawful for a judge or jury to decide in favour of a plaintiff, justice being on his side; but a contract to do so for a money consideration would be not merely void, but illegal, and no presumption could cure it. This is illustrated by the cases of *Hartley* v. *Rice*, 10 East, 22, *Allen* v. *Hearn*, 1 T. R. 56, *Card* v. *Hope*, 2 B. & C. 661, 4 D. & R. 164, and *Key* v. *Bradshaw*, 2 Vern. 102. [*Patteson*, J.—In your argument in the court below, you admitted that the contract of trustees to indemnify a husband from his wife's future debts, is a good consideration for the husband's contract with them.] That rests upon grounds perfectly distinct, which were pointed out in the argument below; to which it may be added, that such a contract is free from the objection here made, inasmuch as it holds out no inducement to separation, but merely gives an indemnity. One of the learned judges of the Common Pleas is reported to have said that "courts of law view separation deeds with

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more favour than formerly." But it is submitted, that, for nearly half a century, the current of authorities has set most strongly the other way. See them collected in the reports of the argument in the court below, 1 New Cases, 659, 1 Scott, 733. *Elworthy* v. *Bird*, 2 Sim. & Stu. 372, is the only case of an opposite aspect. But there an equity had already arisen from a separation de facto: and that case has not been considered to be in conformity with the acknowledged principles of courts of equity.

R. V. Richards, contrà.—The special grounds of demurrer, perhaps, cannot be supported. But the part of the consideration which is not answered is sufficient to support the promise. Unless there be an absolute illegality, the mere trouble of executing a deed, however trifling, is a good consideration. *Pullin* v. *Stokes*, 2 H. Blac. 312, shews that the court will give effect to a consideration, however small. No illegality appears, and none will be presumed. First, it does not distinctly appear that the deed was a deed separating the husband and wife, in the sense attributed to it on the other side. The nature of the deed is not substantively alleged: the word "separation" has many meanings. But, supposing the deed to be a deed suspending the relation of husband and wife, such deed may be legal: then, the deed here not being set out, the court will assume that it is legal. In *Hobson* v. *Middleton*, 6 B. & C. 295, 9 D. & R. 249, Bayley, J., said: "Although in general, in pleading, an equivocal expression is to be construed against the party using it, yet, where the opposite party has pleaded over, that is an admission that the expression is to be taken in that sense which will support the previous pleading." [*Littledale*, J., referred to the language of Lord Ellenborough in *Ord* v. *Fenwick*, 3 East, 104.]

It is argued, that, even assuming the deed to be legal in its terms, it would be illegal to promise to pay this money

as a consideration for executing it. That might or might not be so, according to the situation of the parties. Supposing them already separated, this money might be paid merely to facilitate arrangements for the support of the wife, the distribution of the property of the two, and many other purposes which under such circumstances would not contravene the policy of the law. If in any state of things not inconsistent with the record the transaction would be legal, the court will assume that to be the actual state of things. Besides, the language of the record shews that the parties were separated: at any rate, it negatives the supposition made on the other side, that the separation originated in the agreement; for, a deed of separation appears to have been prepared, containing terms to be mutually agreed on between the parties. Then, the agreeing, for money, which is to be applied to the past expenses of the parties, to execute the deed, is very different from agreeing to live separate. Even had the agreement been to live separate, it does not follow that the contract would be void. It is a fallacy to say that the courts have uniformly discountenanced deeds of separation. *Elworthy* v. *Bird*, 2 Sim. & Stu. 372, may not be an authority of much weight; for, the circumstances there were very peculiar. But it will be found that the courts have considered the legality of these deeds to be too firmly established to be now questioned. It is further assumed on the other side, that this is simply the case of money paid to the husband. It is money paid towards the by-gone household expenses of the husband and wife. Why should not an arrangement as to this be made a part of the terms of the separation itself, as well as a contract by trustees to indemnify the husband against the wife's future debts, to which, it is admitted, there is no objection?

Supposing this part of the consideration to be void, the agreement may be supported on the residue of the consideration. The plea does not avoid this. A party by

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agreeing to make a payment alters his situation: it cannot be said that after the agreement is executed he lies only under the antecedent liability.

Ellis, in reply.—The plaintiff in error contends that the declaration shews a substantive illegality, by treating the promise to pay money as the inducement to execute the deed. It is urged on the other side that the money is to be applied to the payment of by-gone household expenses of the parties: but it stands admitted on the record that the husband was at the time of entering into the agreement solely liable for these expenses. It is therefore like a promise to pay his debts for him, or a promise to pay him monies numbered. Besides, there is nothing whatever on the record connecting these expenses with the wife. Then, it is said that the nature of the deed does not substantively appear. There is no ambiguity in the words—"deed of separation between husband and wife." Such a head in a schedule to a stamp act would be perfectly unequivocal. The attempt on the other side, is, to confound the question whether the deed per se, and in its terms, must be supposed legal (which the plaintiff in error admits), with the question whether the execution by a husband of a deed of separation, legal or illegal, can be a good consideration for a promise by a third party to pay money to the husband. As to the suggestion that the court will import the fact of an antecedent separation or agreement to separate, no answer has been offered to the authorities cited in opposition to such a construction of the record. The plaintiff in error concedes that every allegation in the declaration shall be construed most favorably for the plaintiff below, and that is all that *Hobson* v. *Middleton*, 6 B. & C. 295, 9 D. & R. 249, and *Ord* v. *Fenwick*, 3 East, 104, shew. But here is an entire absence of any allegation whatever of a separation pre-existing: and such an allegation, if made, would not aid.

Cur. adv. vult.

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PATTESON, J.—The objection to the plaintiff's recovering in this action a sum of 110*l.* which the defendant had promised to pay him at Michaelmas, 1834, arises from the consideration for that promise. From the declaration and plea it appears that the consideration consisted of two parts—first, the plaintiff's executing a deed of separation between himself and his wife which had been already prepared—secondly, the plaintiff's taking upon himself certain payments to Messrs. Horne & Gates, and certain household expenses and debts, and agreeing to pay the same in full; but for which payments, expenses, and debts, the plaintiff was already solely liable. The second part of this consideration may be treated as wholly nugatory, as being merely an engagement by a man to pay his own debts; and the question turns entirely upon the first part. If that be illegal the action must fail, because illegality of part of the consideration doubtless vitiates the whole contract.

Deed of separation legal.

Now, it is conceded that a separation between husband and wife may be in itself a legal act, and that any deed or agreement for carrying it into effect may be legal, provided it be for an actual and immediate, and not for a contingent or future separation. The terms of the deed of separation in the present case are not stated upon the record; but, as illegality is not to be presumed, we must take it that the deed is in its provisions legal. It is, however, said that it is illegal to give the husband money as an inducement to consent to such actual and immediate separation, and that an engagement to pay him part of certain debts for which he is solely liable, is tantamount to giving him money. The illegality of so doing is sought to be established by reference to the cases of *Hartley* v. *Rice*, 10 East, 22, *Allen* v. *Hearn*, 1 T. R. 56, *Card* v. *Hope*, 2 B. & C. 661, 4 D. & R. 164. Those cases are perhaps distinguishable. In *Hartley* v. *Rice* the agreement not to marry was held illegal in itself, quite independently of *money* being the inducement. *Allen* v. *Hearn* was a case of wager as to the election of members of parliament,

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a matter which was held to be incapable of being the subject of any binding contract. *Card* v. *Hope* turned upon the contract being a fraud upon the bye-laws of the East India Company. But, admitting that the consent of the husband to a separation cannot legally be purchased, it by no means follows that part of the arrangements in carrying into full effect a separation previously agreed upon, may not legally be that the husband should be indemnified in the whole or in part against certain debts contracted during the time that he and his wife were living together, and for which he is solely liable in point of law, in the same manner as it is unquestionably a legal part of such arrangement that he should be indemnified against debts to be contracted afterwards, for which he might also become liable in point of law. On the contrary, I am of opinion that such indemnity is legal, and that the husband might legally make it the condition of his executing the deed of separation which had been prepared.

The question, therefore, as it seems to me, is reduced to this—whether, upon the face of this record, it appears that the defendant promised to pay the plaintiff money in consideration of his separating or agreeing to separate from his wife; in which case I think that the contract would be illegal: or that the defendant promised to pay the plaintiff money towards certain expenses already incurred whilst the plaintiff and his wife were living together, in consideration that the plaintiff would execute a deed of separation which had been already prepared.

I think that the record shews that this latter state of facts exists.

I agree with the learned counsel for the defendant (plaintiff in error), that the court cannot conjecture anything respecting the contents of the deed of separation, or import into the case any supposed facts for the purpose of shewing the legality or illegality of the contract. I take the facts only as they appear on the record; and they are

these:—that, by a deed of separation between the plaintiff and his wife, not yet executed by the plaintiff, he was to quit a house at Holloway on a certain day, and that some annuity was mentioned in that deed; that afterwards, by the written memorandum of agreement on which the plaintiff in this action declares, the time for quitting the house at Holloway was extended; that the plaintiff agreed to pay Messrs. Horne & Gates, the household expenses at Holloway, and the Rickmansworth debts, in full; and that, in consideration of his so agreeing, and of his executing the deed of separation, the defendant promised to pay him 160*l.* by eight half-yearly payments, towards the debt due to Horne & Gates, 20*l.* towards the Rickmansworth debts, and 220*l.* by two payments, at Michaelmas, 1834, and Lady-Day, 1835, towards the household expenses at Holloway.

It is plain from these facts, that, for some reason or other (and we are not to presume an illegal one), a separation between the plaintiff and his wife had been determined upon, the terms of which had been reduced into writing in the form of a deed; that the plaintiff, for some reason or other, had not yet executed that deed; and that he was induced to execute it by the defendant's promise, which is in effect a promise to indemnify the plaintiff from, among other things, a part of the by-gone household expenses at the house at Holloway which the plaintiff was to quit.

I assume the deed of separation to be legal, because no illegality is shewn; and I hold the consideration for the defendant's promise to be legal, because it is not that the husband would separate from his wife, but that he would complete the instruments and arrangements of a separation already determined upon.

For these reasons, I am of opinion that the judgment of the court below ought to be affirmed.

ALDERSON, B.—I also am of opinion that the judgment

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of the court of Common Pleas ought to be affirmed; and I shall state my reasons very shortly.

An engagement to pay money as an inducement for a future separation, illegal.

It is conceded, that, if any part of the consideration for the promise of the defendant below be illegal, the judgment ought to be reversed. And it cannot be disputed that an engagement to pay a sum of money as an inducement for a future separation of a man from his wife, would be contrary to law. But the difficulty is, to point out upon these pleadings that the illegality is sufficiently alleged. It appears clearly from the declaration, that a deed of separation had been prepared before the agreement declared on; for, the first statement in the agreement on which the plaintiff proceeds speaks of enlarging the time mentioned in such deed of separation; and it speaks also of the annuity mentioned in it, which may probably be taken to be an annuity to be paid by the plaintiff to his wife. The engagement of the defendant to pay the sums mentioned in the agreement is then stated to be on the consideration of the plaintiff's *executing this deed of separation*, and taking on himself the payment of certain debts. All this is quite consistent with a previous separation already agreed on between the husband and wife; and there is nothing that I can see illegal, after husband and wife have actually separated, upon certain terms mutually agreed between them, in a third person's undertaking to pay certain debts, in order to induce the husband to execute a deed of separation, and thereby secure to the wife the advantages so stipulated for at the antecedent time when their actual separation took place.

If all this be consistent (and I think it is) with the facts stated in this record, there is nothing shewn to be illegal in the consideration for the defendant's agreement. If there had been no previous separation, and it was in truth a bargain for a separation in future, the defendant should have shewn that affirmatively in pleading; for, illegality is not to be presumed; but, unless the contrary be expressly

alleged upon the record, we ought to assume that the parties have acted in conformity to the law.

For these reasons I think that the judgment of the court of Common Pleas ought to be affirmed.

LITTLEDALE, J., signified his concurrence with the opinions expressed by Patteson, J., and Alderson, J.

Opinion that the consideration stated in the declaration is illegal.

Lord ABINGER, C. B.—In this case the declaration sets forth two considerations for the promise to pay a sum of money to the plaintiff: the first is, that the plaintiff should pay certain debts and discharge certain expenses; the second, that he should execute a deed of separation from his wife. The plea is applied to the first of these considerations only, and alleges that the debts were due from the plaintiff, and that he was bound to pay the expenses in question. Upon the other consideration it is silent. To this plea there is a demurrer, upon which two questions arise—first, whether the payment of or the promise to pay a debt to which the party promising is already liable by law, is a good consideration for a promise to him of money or other advantage—secondly, if it be not, whether the executing a deed of separation from his wife is a lawful consideration for a promise to pay money to the husband. If both these questions are to be answered in the negative, the plea is good; because it alleges a sufficient answer to the only consideration upon which the declaration can be sustained, and because there is no occasion to make any answer to the other part of the consideration, which is illegal.

Now, a consideration to support a promise must either operate to the advantage of the party making the promise or to the detriment of the party who is to perform the consideration. But a man is under a moral and legal obligation to pay his just debts. It cannot therefore be stated as an abstract proposition that he suffers any detri-

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ment from the discharge of that duty: and the declaration does not shew in what way the defendant could have derived any advantage from the plaintiff paying his own debts. The plea, therefore, shews the insufficiency of that part of the consideration.

With regard to the other consideration, to which the plea does not apply, it has been argued, that, as the law will recognize the legality of deeds of separation by allowing actions of covenant to be maintained upon them, it cannot be presumed that they are illegal; and that, if they be not illegal, of course the execution of such a deed by the husband cannot be illegal. Now, this proposition must at least receive this qualification—that the consideration which prevails on the husband to make such a deed be a good consideration in law to justify him in separating from his wife.

There are certain circumstances which will induce the Ecclesiastical court to pronounce a decree of divorce à mensa et thoro; and it may not be unlawful for a man under the same circumstances voluntarily to agree to do that which the law, if he refused, would compel him to do. Upon this ground, a deed of separation made upon due consideration may well be considered as not unlawful. But the question is very different whether it be lawful in a husband to separate from his wife in consideration of a sum of money. It cannot be doubted that the separation between husband and wife without adequate cause, is both against the law of God and against the policy of every civilized society. The circumstances therefore which justify a separation, as they only justify an exception to a very important general rule, ought not to be presumed. But, whether they might be presumed or not in support of a deed of separation *already executed*, it cannot be maintained that the receiving a sum of money by the husband is one of those circumstances; much less a circumstance which alone would justify a separation. The record in this case,

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when stripped of the superfluous matter which has been disposed of by the plea, presents nothing more than the naked fact of a separation by a husband from his wife in consideration of a sum of money. It is not necessary, for the purpose of this investigation, to review the cases which have been cited upon this subject. It is enough to say that none of them has gone the length of deciding that a deed of separation reciting as the only consideration of the husband's agreement to separate, the payment of a sum of money to him, would be a lawful deed. If such a deed would not be lawful, how can it be maintained that it would be lawful for the husband to accept money, or the promise of money, as the consideration for signing a deed of separation? In this case no other consideration appears; and the court is not bound to presume any other, in support of an agreement which is against the general rule of law, and can only be good by way of exception under special circumstances.

But, in truth, pecuniary advantage to the husband ought to form no part, and can therefore form no legal part, of a consideration for a separation from his wife. Either the circumstances are such as to make of themselves a good consideration for executing the deed, or they are not. If they are, the addition of money forms no part of the legal consideration. If they are not, the addition of money cannot make them so. Therefore, whether the court be at liberty or not to presume, in the absence of all suggestion upon the subject, that there might have been a lawful cause for the husband to separate from his wife, it is certain that the promise of money to be paid to him cannot have been a lawful inducement, whether it was the exclusive or the partial consideration upon which he agreed to execute a deed of separation.

The judgment, therefore ought to be reversed.

Lord DENMAN, C. J.—This declaration states a promise

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to pay a sum of money to the plaintiff's use, in
ation of his taking upon himself certain debts a
ties and executing a deed of separation from
The defendant pleaded that the debts were due
plaintiff himself, and that he was already liabl
them; consequently, that his undertaking to p
could form no consideration for the defendant's
To this plea there was a demurrer: but it was
that the latter part of the consideration came to n
the sole consideration for the promise to pay m
the execution of a deed of separation. The de
was therefore questioned on this ground.

It was first urged in its support, that, as some
separation may be legal, this must be presumed le
the defendant's having pleaded; and reference
to the authority of Bayley and Holroyd, Justices, i
v. *Middleton*, 6 B. & C. 295, 9 D. & R. 249, for the
that, in any pleading where a fact is ambiguous
the adverse party by pleading over shall be taken
it in the most favourable sense of which it is ca
apprehend, however, that this rule must be rest
cases where the pleading over directly refers to
biguous matter, and answers it by introducing s
new. But here the pleading over is confined to oth
the statement of this part of the contract is not n

hought that the declaration further stated that the plaintiff ıad previously entered into an agreement to execute the leed, and further, that the annuity was to be paid by him. Neither of these facts can I discover on the record, though he latter is probable in fact. Perhaps they would not naterially vary the question, for, the result would equally ɔe that the plaintiff, when free to execute or refuse to exeıute a deed of separation from his wife, had been induced to ıxecute it by the promise of money. For breach of that ıromise the present action is brought; and the single quesion raised, is, whether the execution of such a deed be a ;ood consideration for a promise to pay money to the ıusband.

That deeds for the separation of married persons may ɔe valid and effectual for certain purposes, many decisions ıave established. *Lister's* Case, 8 Mod. 22, and *Rex* v. *Mead*, 1 Burr. 542, shew that they will be taken notice of ɔy courts of law, where separation had been rendered necesıary for the wife's protection, by cruelty and ill-usage on he husband's part. And, even in equity, deeds securing a ɛparate maintenance for the wife, which had been renlered necessary by the husband's misconduct, were upheld n the three cases of *Oxenden* v. *Oxenden*, 2 Vern. 493, *Vicholls* v. *Danvers*, 2 Vern. 671, and *Williams* v. *Callow*, ! Vern. 752. Most probably, *Seeling* v. *Crawley*, 2 Vern. 386, proceeded on the same ground. Again, if a third ɛrson take upon himself the maintenance of the wife while eparated from her husband, the husband has been held ompellable to pay the sum which on that consideration ɛ bound himself to pay to the trustee—*Gawden* v. *Draper*, Vent. 217: and a husband's release to such a trustee, n the same consideration, of his remainder in an estate, ras held by Sir William Grant to be good even against the ssignees of that husband when a bankrupt, in *Worrall* . *Jacob*, 3 Meriv. 268.

That the husband himself may derive protection against

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debts incurred by his wife while living apart from him, by shewing that he had agreed with a trustee to provide adequate funds for her maintenance, and had in fact provided them, is clearly established by several cases, particularly by that of *Nurse* v. *Craig*, 2 N. R. 148, by a decision unanimous on that point, though Sir James Mansfield differed from the opinion that it was necessary for the husband to pay the money agreed for. Yet the assertion that deeds of separation are at variance with the policy of the law, has been often made by the highest authorities, and never disputed by any. Many of the judges who have given effect to them for any purpose, have expressly declared that they adopted them to that extent with reluctance, and would have paused if the question had been new—Lord Rosslyn in *Legard* v. *Johnson*, 3 Ves. 352; Lord Eldon in *Beard* v. *Webb*, 2 B. & P. 93, and in *St. John* v. *St. John*, 11 Ves. 526. Sir William Grant pointedly declares it to be now settled, that "the court of Chancery will not carry into effect articles of separation between husband and wife. It recognizes no power to vary the rights and duties growing out of the marriage contract, or to effect at their pleasure a partial dissolution of that contract." And, in establishing the husband's conveyance of property in consideration of the trustees undertaking to indemnify him against the wife's debts, he adds: "It does seem rather strange that the auxiliary agreement should be enforced, while the principal agreement is held to be contrary to the spirit and the policy of the law." But the validity of the principal agreement is now in question before us: if it is not valid and binding, the husband's execution of it cannot be a good consideration for a third party's promise to pay him money.

There appears to be a strange inconsistency in pronouncing a deed to be valid, and admitting at the same time that it cannot be enforced; or, in contending that it might be the foundation of a suit at law, while it notoriously supplies no ground for a specific performance, because

equity regards it as contrary to public policy. But, beyond that objection in point of principle, the legal relation of the parties creates great difficulties: and the question may be again asked, as it was by Lord Eldon in several cases, on whom *can* the contract be binding? Not on the wife, for she cannot contract with her husband or execute a deed. Not on the husband, unless a third party may sue him for a breach of covenant in performing the duties of a husband towards his wife. Reverse the present case, and suppose that the husband had accepted the money on a promise to execute the deed, and been sued for breach of promise, could an action for damages have been maintained? If not, it seems to follow that the execution of a similar deed cannot form the legal consideration for a promise to pay money.

I am aware of the case of *Rodney* v. *Chambers*, 2 East, 283, which determines that an action will lie against a husband having executed a deed of separation, for the sum which he contracts to pay to trustees in case of a future separation, subject to their approval. But this decision has received some severe shocks from the strictures of Lord Eldon in *St. John* v. *St. John*, and must be considered as directly overturned by the King's Bench in *Hindley* v. *Lord Westmeath*, though it is difficult to explain why a present separation is less contrary to public policy than the agreement to give effect to one, if rendered necessary by circumstances, at a future time. I am also aware of the case of *Jee* v. *Thurlow*, 2 B. & C. 547, 4 D. & R. 11, where the court of King's Bench sustained a covenant made by a husband to pay an annuity to the wife's trustees under a deed of separation. Lord Tenterden, and Bayley, J., certainly thought themselves bound by decisions which have to a certain extent recognized such deeds; but the other two judges were cautious in their expressions: and the opinion of Holroyd, J., is remarkable, in looking to the trustees' covenant to indemnify as the basis of the husband's obligation in the deed,

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their covenant being, as he particularly remarks, not limited to the period of separation. I have also carefully examined the numerous cases cited in Mr. Jacob's edition of Roper on Law of Husband and Wife, and the able commentary upon them. Some of them were, avowedly, and doubtless most of them actually, brought before courts of equity by consent for the purpose of obtaining directions on the effect of similar deeds, without disputing their legality. Some of them I take to be undoubtedly erroneous; such as *Hoare* v. *Hoare*, decided in the Irish House of Lords, where the stipulation of a marriage settlement for the contingency of the parties' separating, was upheld. If I could venture to lay down the principle which alone seems to be safely deducible from all these cases, it is this—that, when a husband has by his deed acknowledged his wife to have just cause of separation from him, and has covenanted with her natural friends to allow her a maintenance during separation, on being relieved from liability to her debts, he shall not be allowed to impeach the validity of that covenant.

But, even if the most questionable of these cases were good law, and deeds of separation binding for every purpose both at law and in equity, all former decisions fall infinitely short of the present, where the promise to pay the husband a sum of money is the consideration for his executing the deed. This alone it is that substantially appears on the present record. Generally speaking, the lawfulness of a thing promised does not make it lawful to promise to do it for a money consideration. It is lawful to vote for a candidate at an election, but bribery to give or promise the voter money for so doing.

The same principle was illustrated by numerous authorities cited at the bar. And in the case of married persons contracting for their separation, which I take to be at least primâ facie illegal, where no circumstances by which it is legalized are set forth, and no justifiable motive is assigned, it appears to me a dangerous novelty to permit the abdica-

tion of conjugal rights and the abandonment of marital duties to be made the subject of a money stipulation.

It is satisfactory, as well as proper, to add that the purchase of a husband's consent to separation is admitted to be illegal; and this promise is held binding only as it may be a part of the negotiation which leads to a separation that may possibly be legal. But I am unable to distinguish the two cases, and think the latter contract neither more nor less than an indirect mode of securing effect to the former.

Judgment affirmed (86).

(86) It will be observed that Lord Denman, C. J., and Lord Abinger, C. B., do not concur in this judgment.

MEMORANDA.

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Resignation of Bolland, B.

MR. BARON BOLLAND in Hilary Term last resigned his seat in the Court of Exchequer.

Appointment of Maule, B.

William Henry Maule, Esq., of Lincoln's Inn, one of her Majesty's counsel, was shortly after the last Term called to the degree of the coif: he gave rings with the motto—"Suum cuique." He was appointed to succeed Mr. Baron Bolland as one of the Barons of the Exchequer; in which court he accordingly took his seat on the first day of the present Term.

Queen's counsel.

In Hilary Vacation, William Goodenough Hayter, Esq., of Lincoln's Inn, received a patent of precedence; and the following gentlemen were appointed of her Majesty's counsel learned in the Law:—John Stuart, Esq., of Lincoln's Inn, Robert Vaughan Richards, Esq., of the Inner Temple, Samuel Girdlestone, Esq., of the Middle Temple, and Griffith Richards, Esq., of the Inner Temple.

IN THE COMMON PLEAS.

EASTER TERM, 2 VICTORIÆ.

THE JUDGES WHO SAT IN BANC DURING THIS TERM WERE—
TINDAL, C. J., BOSANQUET, J., COLTMAN, J., AND ERSKINE, J.

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Monday, April 15th.

HUTCHINSON *v.* MORLEY.

A contract for the sale of fixtures and fittings of a public-house—Held, to be avoided by a false representation by the vendor as to the amount of business attached to the house, though the agreement expressly excluding *goodwill*.

ASSUMPSIT for money had and received to the plaintiff's use. Plea, non assumpsit.

The cause was tried before Erskine, J., at the Sittings at Westminster after the last term. The action was brought to recover back a sum of 20*l.*, the amount of a deposit paid by the plaintiff to the defendant on an agreement for the purchase of fixtures and fittings of a public-house (from which agreement the *goodwill* was expressly excluded), on the ground of an alleged misrepresentation as to the amount of business attached to the house. A witness called on the part of the plaintiff proved a conversation between the defendant, the outgoing tenant, and the plaintiff, as to the fixtures, in the course of which the defendant was asked what was the quantity of business done at the house; to which he answered—four butts of beer per month, and

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from 25*l.* to 30*l.* in spirits. This was proved to be grossly false.

The learned judge left it to the jury to say whether or not the word "goodwill" had been erased from the agreement (the common printed form) before its execution, and whether there had been a misrepresentation as to the amount of business attached to the house.

The jury returned a verdict for the plaintiff, for 20*l.*

Andrews, Serjeant, now moved for a new trial, on the ground that the verdict was against evidence.—He submitted, that, it being perfectly clear that the contract between the parties did not include the goodwill of the house, any misrepresentation as to the amount of the business, in a loose conversation having reference to a bargain for a totally different subject-matter, could not affect the validity of the contract; and consequently that there was no evidence whatever to sustain the verdict.

TINDAL, C. J.—A man would not buy fixtures and fittings of a public-house without intending to become the occupier of the premises. Supposing therefore that these alone were the subject of the contract, and that the goodwill formed no part of the agreement, still I think the jury were warranted in inferring that the defendant's misrepresentation as to the trade of the house operated upon the plaintiff's mind, and was an inducement to him to purchase the fixtures. The case having been fairly left, I see no ground for disturbing the verdict.

The rest of the court concurring—

Rule refused.

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Monday, April 15th.

Ex parte THOMPSON.

An attorney *re-admitted* in one of the courts at Westminster, is entitled, under the 7 Will. 4 & 1 Vict., c. 56, s. 4, to practise in the other courts, without re-admission therein.

TIN moved for the re-admission of an attorney. rty applying had already been re-admitted in the ' Queen's Bench: but an apprehension was enter- that such re-admission would not enable him to in the other courts, under the 7 Will. 4 & 1 56, s. 4, which provides "that any person who shall ben duly *admitted* an attorney in any one of her 's courts of law at Westminster shall be at liberty ise in any other of her majesty's courts of law at inster, although he may not have been *admitted* an y thereof; and that no person having been duly d an attorney or solicitor in any of her majesty's of law or equity at Westminster, shall be prevented covering or receiving the amount of any costs ould otherwise have been due to him, by reason of being admitted an attorney or solicitor of the court h such costs shall have been incurred; provided that any attorney or solicitor practising in any f law or equity shall be subject to the jurisdiction court as fully and completely to all intents and s whatever, as if he had been duly *admitted* an y or solicitor of such court."

CURIAM.—The applicant, having been *re-admitted* Queen's Bench, is to all intents and purposes *ad-* n that court, so as to enable him to practise here. is necessary.

Refused.

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Monday, April 15th.

The court will under *very* special circumstances relax the rules required to be observed on the re-admission of attornies.

Ex parte EDWARD SMITH.

MILLER moved that Mr. Smith might be re-admitted to practise as an attorney of this court, under the following circumstances:—

He was struck off the roll upon his own motion in the last term; since which, the death of his father, who had also been an attorney, and who had been engaged in several suits, which the clients were desirous of having carried on by the applicant, had induced him to return to the profession. The requisite notices had only been given on the 12th instant; and the rule of Hilary Term, 6 Will. 4 (3 Scott, 4) requiring the affidavit to be filed with a Master, had not been complied with.

PER CURIAM.—Under the peculiar circumstances of the case, the affidavit may be now filed, and the rule for the party's re-admission drawn up on the last day of the present term. This, however, must not be drawn into a precedent.

Fiat.

Monday, April 15th.

Judgment as in case of a nonsuit cannot be moved for by one of several defendants, where the others are not in a condition to join in the motion.

FOWLER *v.* DUKE and Two Others.

GURNEY moved for a rule to shew cause why there should not be judgment as in case of a nonsuit entered for *one* of the defendants. The other two defendants were not in a situation to concur in the motion, issue not having been joined early enough as to them.

TINDAL, C. J.—The defendants are all embarked in one boat, and must sink or swim together.

Rule refused (87).

(87) It was formerly held, that, if one of two defendants suffered judgment by default, the plaintiff could not be nonsuited as to the other, and consequently in such case there could not be judgment

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Monday, April 15th.

COOPER *v.* TALBOT.

Where a rule is obtained upon an affidavit erroneously intituled, the court will not discharge it, but will permit the affidavit to be amended and re-sworn.

ſMPSIT for money had and received, tried before lersheriff of Middlesex.

ley, in the last term, obtained a rule nisi to enter uit, upon an affidavit intituled "James Cooper v. ," the plaintiff's true name being Edmund.

ntine, before shewing cause, objected that the affi- upon which the rule was obtained, being wrongly ed, could not be used.—He cited *Phillips* v. *Hutch-* 3 Dowl. 20, where "Phillips, Assignee &c.," was held an irregular mode of describing the plaintiff in ing an affidavit: Littledale, J., saying: "I think it to appear what kind of an assignee the plaintiff is,

se of a nonsuit—Weller v. 1 Burr. 358; Harris v. y, Cowp. 483; Hannay v. 3 T. R. 662. But, in Mur- Tomlan, 7 D. & R. 619, 5 . 178, it was held that one defendants suffering judg- default, does not alter the 's right to be nonsuited as ther defendant.

mes v. *Gibson and Smith*, 8 . 592, 5 B. & C. 768, there o defendants, who pleaded y by different attornies. aving been joined as to Michaelmas Term, one of Smith) in the Trinity Term ig moved for judgment as of a nonsuit. The court it to the Master to report he practice. The Master's which the court adopted, follows:—

"By statute 14 Geo. 2, c. 17, which authorizes the application to the court for judgment as in case of a nonsuit, it is provided that all judgments given by virtue of that act shall be of the like force and effect as judgments upon nonsuit, and of no other force or effect. In the absence of any authority upon this point, I apprehend, if this case had gone down to trial, and either of the defendants had appeared by his counsel, the plaintiff might have been called and nonsuited. I am therefore of opinion that the defendant Smith is entitled to have the rule made absolute for judgment as in case of a nonsuit, and which will authorize a general judgment of nonsuit to be entered against the plaintiff."

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COOPER v. TALBOT.

in order that it may be seen whether he is an assignee of a person to whom by law he may be an assignee." And, in answer to a suggestion that the affidavit might be amended, he referred to the same case, where the same learned judge, after time taken to consider, said: "It appears to me that the title cannot be amended. How can you have an affidavit dated one day, in support of a rule several days old, and which is supposed to have been granted on that affidavit? Great inconsistency would then appear. Then, it is said that the rule may be enlarged. There also the same objection will arise, because then it must be the original rule which is discharged or made absolute."

TINDAL, C. J.—It seems to me that it would be a very hard measure of justice to permit the rights of a party to be lost in consequence of so mere a mistake. The affidavit may be amended and re-sworn. The costs of the plaintiff's appearance here to-day must of course be paid.

The rest of the court concurring—

Rule accordingly (88).

(88) Cause was shewn on a subsequent day, and the rule for entering a nonsuit made absolute.

Monday, April 15th.

The court cannot, without the consent of the parties, postpone the trial of issues in fact, until the decision of a court of error is obtained upon a judgment pronounced upon issues in law on the same record.

BECKHAM *v.* KNIGHT and DRAKE.

AN agreement was entered into between the plaintiff and Knight and Surgey (not in the name of a firm), by which it was stipulated that the plaintiff should enter their service as foreman for the period of seven years if Knight and Surgey, or either of them, should so long live. At the time this agreement was made, one Drake was a dormant partner with Knight and Surgey, but this fact was unknown to the plaintiff.

After the death of Surgey, the plaintiff sued Knight and

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e (whom he had discovered to have been a secret
ıer with Knight and Surgey at the time the agreement
nade) for a breach of the contract. The two defend-
by different attornies, pleaded separately several
. Drake's first plea denied his liability, the agree-
; having been entered into by Knight and Surgey
idually, and not as a firm, and the plaintiff not being
e of any secret partnership. Judgment having been
ɔunced by the court in favour of the defendant Drake
this plea (see 5 Scott, 619), the plaintiff brought a
of error.

ıe plaintiff being desirous not to incur the expense of
ɛ down to try the issues of fact, until the opinion of
ɔurt of error had been taken upon the judgment of
ɔurt upon Drake's first plea, which if affirmed would
ı discharge of both defendants—

ammers, in the last term, moved for a rule calling upon
lefendant to shew cause why the trial of the issues in
joined between the parties should not be stayed until
the decision of the court of error should be pro-
ıced. He cited *Burdett* v. *Coleman*, 13 East, 27.

NDAL, C. J.—The judgment we have pronounced is
in the nature of an interlocutory judgment for one
ıe defendants. Unless the defendants consent, I fear
ınnot help you. However, you may take a rule.

V. Williams (for Drake) now shewed cause.—A writ
ror does not lie upon a judgment pronounced upon a
of a record—note to *Jaques* v. *Cesar*, 2 Wms. Saund.
If it were otherwise, the same record might be the
ɔct of two writs of error. The operation of the writ of
at common law was, to remove the record entirely to
ourt of error: and no difference is made in this respect
ıe provision in the statute 11 Geo. 4 & 1 Will. 4,

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c. 70, s. 8, " that a transcript of the record only shall be annexed to the return of the writ." That a writ of error can only be brought upon a *final* judgment, is clear from *Metcalfe's* Case, 11 Rep. 38. a., *Fitzwilliams* v. *Copley*, Dyer, 291. b., pl. 68, and the notes, *Samuel* v. *Judin*, 6 East, 336, and Viner's Abridgment, *Error*, (M). Suppose this record were taken up to the court of error as it now stands, and the judgment pronounced by this court should be reversed, non constat that the defendants might not afterwards succeed upon the issues in fact. In every view, the course suggested is beset with difficulties and inconveniences probable as well as possible. How would the court of error deal with such a record?

Wilde, Serjeant, and *Stammers*, appeared to support the rule: but the court entertaining a clear opinion that they had no power to order that which the rule prayed, it was ultimately agreed between the parties that so much of the record as stood in the way of the writ of error should be expunged, with liberty to either party to restore it if necessary.

Rule accordingly (89).

(89) See the next case.

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CARDEN v. THE GENERAL CEMETERY CO.

possible to suggest any arrangement that will prevent the plaintiff from being delayed. Besides, here, the issues in fact are quite distinct and independent of the issue upon which the court have already pronounced a judgment: and the parties must still go down to trial upon the issues in fact, if the judgment of this court should be affirmed.

PER CURIAM.—However anxious we may be to further any arrangement that would prevent expense to the parties, we cannot interfere. It must be matter of consent.

Rule discharged (90).

(90) See the preceding case.

TYERS *v.* STUNT.

Friday, April 19*th.*

The defendant was indebted to the plaintiff in two separate sums. On obtaining his discharge under the insolvent debtors act, he inserted in his schedule one of the debts only:—Held, that he was not released from the other debt.

THIS was an action of assumpsit for goods sold and delivered. The defendant pleaded his discharge under the insolvent debtors act, 7 Geo. 4, c. 57; upon which the plaintiff in his replication took issue.

The cause was tried before Arabin, Serjeant, in the sheriff's court, London. The action was brought to recover two several sums of 4*l.* 14*s.* 6*d.*, and 3*l.* 9*s.* 8*d.* In support of his plea, the defendant's schedule was produced. But, it appearing that the first sum only was mentioned therein, it was submitted, on the part of the plaintiff, that the defendant was only discharged as to that sum: whereupon the jury, under the direction of the learned Serjeant, returned a verdict for the plaintiff, for 3*l.* 9*s.* 8*d.*

Ryland, pursuant to leave reserved to him, moved that the verdict for the plaintiff might be set aside, and a verdict entered for the defendant.—The adjudication of the commissioners, by the 46th section of the act, enures to the discharge of the prisoner "as to the several debts and

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sums of money due or claimed to be due at the time of filing such prisoner's petition from such prisoner to the several persons named in his or her schedule as creditors, or claiming to be creditors for the same respectively, or for which such persons shall have given credit to such prisoner before the time of filing such petition, and which were not then payable, and as to the claims of all other persons not known to such prisoner at the time of such adjudication, who may be indorsees or holders of any negotiable security set forth in such schedule." Here the plaintiff is named in the schedule. [*Bosanquet*, J.—Not for the debt for which the verdict is taken.] By section 67, the adjudication is declared to be final and conclusive, in the absence of fraud. If there were anything to disentitle the defendant to his discharge as to this debt, the plaintiff should have replied it *specially*—s. 61 (91). [*Coltman*, J.

(91) Which enacts—" That, after any person shall have become entitled to the benefit of this act by any such adjudication as aforesaid, no writ of fieri facias or elegit shall issue on any judgment obtained against such prisoner for any debt or sum of money with respect to which such person shall have so become entitled, nor in any action upon any new contract or security for payment thereof, except upon the judgment entered up against such prisoner according to this act; and that, if any suit or action shall be brought, or any scire facias be issued against any such person, his or her heirs, executors, or administrators, for any such debt or sum of money, or upon any new contract or security for payment thereof, or upon any judgment obtained against, or any statute or recognizance acknowledged by such person for the same, except as aforesaid, it shall and may be lawful for such person, his or her heirs, executors, or administrators, to plead generally that such person was duly discharged according to this act by the order of adjudication made in that behalf, and that such order remains in force, without pleading any other matter specially, whereto the plaintiff or plaintiffs shall or may reply generally, and deny the matter pleaded as aforesaid, or reply any other matter or thing which may shew the defendant or defendants not to be entitled to the benefit of this act, or that such person was not duly discharged according to the provisions thereof, in the same manner as the plaintiff or plaintiffs might have replied, in case the defendant or defendants had pleaded this act, and a discharge by virtue thereof, specially."

The clause is re-enacted by the 1 & 2 Vict. c. 110, s. 91.

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Upon the issue here joined, the burthen of shewing his discharge lay upon the defendant.] The 63rd section, reciting that "it may sometimes happen that a debt of, or claim upon, or balance due from such prisoner as aforesaid, may be specified in his or her schedule at an amount which is not exactly the actual amount thereof, without any culpable negligence or fraud or evil intention on the part of such prisoner," enacts "that, in such case, the said prisoner shall be entitled to all and every benefit and protection of this act; and the creditor in that behalf shall be entitled to the benefit of all the provisions made for creditors by this act, in respect of the actual amount of such debt, claim, or balance, and neither more nor less than the same, to all intents and purposes, such error in the said schedule notwithstanding." (92) Here, it is not disputed that, at the time of the commencement of the imprisonment of the defendant, he was indebted to the plaintiff in the two sums of 4*l.* 14*s.* 6*d.* and 3*l.* 9*s.* 8*d.*; and there is no suggestion of any culpable negligence, or fraud, or evil intention on the part of the prisoner. [*Tindal*, C. J.—The object of that clause was, to cure a mere inaccuracy in the amount of a debt inserted in the schedule. Here, however, is a debt which has never been inserted at all.] The true amount of the debt was 8*l.* 4*s.* 2*d.*

TINDAL, C. J.—The defendant should at all events have been prepared at the trial with evidence to shew that the debt was by mere accident stated in the schedule at 4*l.* 14*s.* 6*d.*, instead of 8*l.* 4*s.* 2*d.* We cannot send the cause down again to cure the defect.

ERSKINE, J.—The adjudication is by s. 46 (93) only final as to the debt stated in the schedule. The debt for which the verdict passed in this case clearly was not inserted in

(92) Re-enacted by 1 & 2 Vict. c. 110, s. 93.

(93) Section 75 of the 1 & 2 Vict. c. 110.

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the schedule, and therefore, as to that, the defendant was not discharged.

The rest of the court concurring—

Rule refused.

Saturday, April 20th.

The defendant became surety for the due payment by one H. N. of monies he might receive on account of the plaintiff. H. N. made default; and an account of his deficiencies having been prepared, and a copy sent to the defendant, with an intimation that the items had been gone over by H. N, and the balance assented to by him, the defendant promised to pay the amount. In an action upon the guarantie, the defendant refusing to produce the account sent to him, a clerk of the plaintiff's was called to identify the account assented to by H. N. with that sent to the defendant:—Held, that his evidence was properly received —Coltman, J., dissentiente.

WARD *v.* SUFFIELD.

ASSUMPSIT upon a guarantie. The declaration stated, that the plaintiff was about to employ an agent for the sale of turpentine and other goods, and that, in consideration that the plaintiff would employ one Henry New as his agent to collect his debts, the defendant undertook and promised to be responsible to him for all sums of money which New might receive as agent for and on account of the plaintiff, not exceeding the sum of 250*l.*: assigning for breach, that New had received moneys which he had neglected to pay over.

The defendant pleaded—first, non assumpsit—secondly, that New did not as such agent receive the moneys alleged —thirdly, that New did account with the plaintiff for all sums received by him as such agent.

The cause was tried before Gurney, B., at the last Spring Assizes at Worcester. It appeared that the guarantie in question, the defendant's signature to which was proved, was given by the defendant and one Bradley. It was proved, that, on the 7th November, 1837, a copy of an account was sent to the defendant by the plaintiff's attorney, with a letter to the following effect:—

"On the other side you have accounts between Ward and New, as agreed to by the latter, by which a balance of 183*l.* 9*s.* 2*d.* is due to Mr. Ward, with some slight deductions for postage &c."

To which the defendant on the 8th returned the following answer:—

"In reply to your's of this morning, I have to inform ou that I have sent by this morning's post to Bradley for is share, which when I have received, I will remit, with ine, to Mr. Ward."

The account so sent to the defendant not being pro-uced, a witness named Laing, the plaintiff's clerk, was hen called. He proved that he had gone over the account ith New, and that the latter admitted its correctness.

On the part of the defendant, it was submitted that New's dmission, he being alive, and, for any thing that appeared, apable of being called, was not evidence. *Goss* v. *Wat-ington*, 6 Moore, 353, 3 B. & B. 132, and *Whitnash* v. *George*, B. & C. 556, were cited.

The learned Baron, however, received the evidence of aing to shew New's admission that the account in ques-ion was correctly stated.

A verdict having been found for the plaintiff, damages 50*l.*—

R. V. Richards, in Easter Term last, obtained a rule nisi or a new trial, on the ground that the above evidence had een improperly received.—In *Goss* v. *Watlington* and *Whit-ash* v. *George*, where entries or admissions by the principal ere allowed to charge the surety, the former was dead. his also was the ground of the decision in *Middleton* v. *Melton*, 10 B. & C. 317, 5 M. & R. 264. It was no part of New's duty to make the admissions as against his sure-ies; and the latter had no means of testing their accuracy.

Then, if this evidence were received improperly, can the ourt take upon themselves to say that it produced no ffect upon the minds of the jury. The rule upon this sub-ect adopted by this court in *Doe* d. *Lord Teynham* v. *Tyler*, M. & P. 377, 6 Bing. 561—that a new trial will not be ranted on account of the admission of evidence which ught not to have been received, if there be sufficient with-ut it to authorize the finding of the jury—has more re-

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cently undergone consideration in the court of Exchequer in the case of *Crease* v. *Barrett*, 1 C. M. & R. 919, where Parke, B., in delivering the judgment of the court, says: "The authority of *Doe* d. *Lord Teynham* v. *Tyler* was quoted to shew that the court have a power to refuse a new trial where evidence has been improperly rejected, if in their judgment the rejected evidence ought to have no effect, and there is enough to warrant the verdict against the party on whose behalf that evidence was offered, supposing it to have been admitted. Something to the same effect had fallen from Sir James Mansfield in 1 Taunt. 14, and from Lord Tenterden in *Tyrwhitt* v. *Wynne*, 2 B. & A. 559. But we cannot help thinking that the rule is there laid down much too generally; and it is obvious, that, if it were acted upon to that extent, the court would in a degree assume the province of the jury; and besides its frequent application would cause the rules of evidence to be less carefully considered; and the litigant parties would in all probability have on most occasions recourse to bills of exceptions for the improper rejection or reception of evidence: a course productive of great delay and inconvenience. In some cases, no doubt, the court may refuse a new trial when the witness has been improperly rejected, as, where the fact which such evidence was intended to establish was proved by another witness, and not disputed—*Edwards* v. *Evans*, 3 East, 451, or where, assuming the rejected evidence to have been received, a verdict in favour of the party for whom it was offered would have been clearly and manifestly against the weight of evidence, and *certainly* set side, upon application to the court, as an improper verdict. We cannot say, however strong our opinion may be on the propriety of the present verdict, that, if the lease had been received, it would have had no effect with the jury; nor that it is clear beyond all doubt, if the verdict had been for the defendant, that it would have been set aside as improper; and therefore we think that there must be a new

trial." Suppose a bill of exceptions had been tendered here, is it not clear that the court of error must have awarded a venire de novo? In *Baron de Rutzen* v. *Farr*, 4 Ad. & E. 53, it was likewise held, that, where improper evidence is received, and a verdict given for the party adducing it, the court will grant a new trial, although there be other evidence to the same point in favour of the same party; unless they see clearly that the improper evidence could not have weighed with the jury, or that the verdict, if given the other way, would have been set aside as against evidence.

Talfourd, Serjeant, now shewed cause.—The evidence in question was tendered before the defendant's letter of the 8th November was produced, and the learned Baron rejected it on the principle laid down in the cases that were cited, viz. that declarations or admissions by a principal are not evidence in an action against the surety, where the principal himself may be called. But, after the defendant's letter had been put in, his lordship thought the evidence ought to be received. It is true, that, according to *Crease* v. *Barrett*, 1 C. M. & R. 919, the courts will not refuse to submit the question to the consideration of another jury, however slight the evidence that has been improperly rejected: but the present case falls within the exception there recognized; for, had this evidence been rejected, and the verdict been for the defendant, it clearly would have been set aside as improper.

R. V. Richards, in support of his rule.—In the absence of New's evidence or his admission of the correctness of the demand, the plaintiff made out no case at all, and the jury must have found for the defendant. There is nothing in the defendant's letter to make New's admissions evidence against him, or to deprive him of the right to the cross-examination of New. Unless the court are convinced that

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the evidence so improperly admitted did not weigh with the jury in forming their opinion, or that their verdict, if given for the defendant, must have been set aside as against evidence, the defendant in this case is clearly entitled to have the matter re-considered by another jury.

TINDAL, C. J.—It appears to me that we may discharge this rule without at all coming into conflict with *Crease* v. *Barrett*. Seeing the purpose for which this evidence was offered, it is quite manifest that this case stands clear of that decision. The account itself, though assented to by the principal, certainly would not be evidence against the surety, unless made so by his own admission. But, looking at the correspondence between the plaintiff's attorney and the defendant, I have no doubt as to its admissibility. It appears, that, on the 7th November, the plaintiff's attorney wrote to the defendant a letter inclosing a copy of the account stating a balance agreed to between the plaintiff and New, the principal: to which the defendant answered: "I have sent by this evening's post to Bradley (the co-surety) for his share, which when I have received, I will remit, with mine, to Mr. Ward." The defendant refusing at the trial to produce the account so transmitted to him, the plaintiff's clerk produced the original, which he had gone over with New, and which was identified. The evidence being received, and properly received, there was no defence to the action.

BOSANQUET, J.—I am also of opinion that this rule should be discharged, on the short ground that the evidence in question was properly received. The defendant by his letter of the 8th November, admitted himself to be liable to the balance as agreed on between the plaintiff and New: and the identity of the account produced with that which New had gone over with the plaintiff's clerk being established, there was an end of the case.

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COLTMAN, J.—The only question is whether the evidence n question was admissible or not; because, if it were struck ut of the report, I am not prepared to say that a verdict he other way would have been so clearly wrong that we nust have set it aside. For the purpose of identifying the ccount sent to the defendant with that which New had ubmitted to him, it was no doubt receivable. But I feel difficulty in saying that it would be competent to the laintiff to shew the assent of New to it as being a just ccount between the parties.

ERSKINE, J.—I am of opinion that the evidence in ques- ion was properly received. The witness stated that the ccount produced was the account a copy of which had een sent to the defendant. The defendant's letter of the th November was written upon the faith of the account ransmitted to him on the 7th being a true copy of the ac- ount to which New had assented; he promised to pay uch balance as New had agreed to; and therefore, evi- lence to shew what was the account so agreed to by New, learly was admissible. For this purpose it was that the vidence was received; not simply as an admission by the rincipal charging his sureties. The rule must be dis- harged.

Rule discharged.

HANNAH *v.* WILLIS.

Saturday, April 20th.

A WRIT of capias having, on the 14th March, 1837, ssued against the defendant at the suit of the plaintiff for he debt, and 10*l.* for costs, in lieu of a bail-bond, under the statute 43 Geo. 3, c. 46, s. 2. The dditional 10*l.* not having been paid into court under the 7 & 8 Geo. 4, c. 71, s. 1, in lieu of special ail, the plaintiff obtained a rule for taking the money out, but did not enter an appearance for the efendant. The defendant afterwards obtained a rule nisi that the money so taken out of court y the defendant, and the additional 10*l.*, might be considered in lieu of special bail. This rule was ischarged. Both these rules were silent as to costs. Another rule was obtained by the defend- nt calling on the plaintiff to shew cause why, *on payment of costs*, the bill on which the action had een brought should not be delivered up to him. This rule was made absolute:—Held, that the laintiff was entitled to the costs of the last-mentioned rule; but not to those of the two former— hose rules being silent as to costs, and not being rules made in the course and progress of the uit, which was determined by the act of the plaintiff in taking the money out of court and declin- ng to enter an appearance for the defendant.

The defendant deposited with the sheriff 200*l.*, the amount of

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200*l.* (the amount of a bill of exchange of which the defendant was the acceptor), directed to the sheriff of Middlesex, the defendant, on the 26th April, deposited with the officer 200*l.*, the amount of the debt, and 10*l.* for costs, in lieu of entering into a bail-bond, pursuant to the statute 43 Geo. 3, c. 46, s. 2; and, on the 29th, entered an appearance to the action. The officer neglected to pay the money into court until the evening of the 5th May, on which day the time for putting in bail above expired. On the 6th, a further sum of 10*l.* (which had been previously tendered at the prothonotaries' office, and refused on the ground that the 200*l.* and 10*l.* deposited with the sheriff's officer in lieu of a bail-bond had not then been paid into court) was paid in in lieu of putting in and perfecting special bail, under the 7 & 8 Geo. 4, c. 71, s. 1.

First rule.

On the same day (the 6th May, and before the additional sum of 10*l.* had been paid in), the plaintiff, upon the usual affidavit, obtained a rule nisi that the several sums of 200*l.* and 10*l.* so as above deposited and paid into court might be paid out to him, the defendant having failed to put in and perfect special bail in due course. This rule was made absolute on the 8th May, the defendant not having produced an affidavit of merits. The plaintiff thereupon took the money out of court, and proceeded no further in the action, notwithstanding the defendant on the 5th August demanded a declaration.

Second rule.

In Michaelmas Term, 1837, the defendant, upon an affidavit of the above facts, and swearing to merits, obtained a rule calling on the plaintiff to shew cause why the several sums of 200*l.* and 10*l.* so as above paid out of court to the plaintiff, and the 10*l.* paid into court on the 6th May, should not be deemed equivalent to the defendant's having duly put in and justified special bail to the action. This rule was in Hilary Term discharged—see 5 Scott, 731, 4 New Cases, 310.

Third rule.

In Michaelmas Term, 1838, a rule was obtained (and

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fterwards made absolute by consent) calling on the plaintiff to shew cause why the bill should not be delivered up o the defendant, and the 10*l.* paid into court in lieu of pecial bail restored to him, on payment of costs (94).

No mention was made of costs in the two former rules.

On the taxation, the Master refused to allow the plaintiff the costs of either of the rules—those of the two first nentioned rules, on the ground that those rules were silent as to costs, and, the plaintiff having, by taking the money out of court, elected to put an end to the action, they were not costs *in the cause*—and those of the last rule, on the ground that the detention of the bill on the part of the plaintiff was improper.

Wilde, Serjeant, on a former day, obtained a rule nisi for a review of the taxation.—He contended that the plaintiff was entitled to the costs of the three rules.

Bompas, Serjeant, and *Petersdorff*, now shewed cause.—The plaintiff clearly is not entitled to the costs of the first two rules. Those rules are silent as to costs—*Anonymous*, 1 Chit. 399, n.; and the costs of them cannot be costs in the cause, the plaintiff having, by taking the money out of court, and declining further to proceed, put an end to the cause. The very ground of the plaintiff's opposition to the rule of Michaelmas Term, 1837, was, that the cause was by his own election put an end to. The plaintiff under the 43 Geo. 3, c. 46, s. 2, cannot in any event obtain costs to a greater amount than 10*l.*, where he takes the money out of court. If the plaintiff had asked for the costs of the former rules, such was the impression of the court as to the hardship of the case, that they certainly would not have been

(94) When this rule was moved for, *Petersdorff*, for the defendant, sought to make it a part of the rule, that the costs of the rule of Michaelmas Term, 1837, should be excluded: but the court observed that the Master would do what was right in the matter.

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granted. [*Tindal*, C. J.—The plaintiff is at all events entitled to the costs of the last rule: it is drawn up on payment of costs.]

Wilde, Serjeant, in support of his rule.—The defendant having paid money into court under the 43 Geo. 3, c. 46, s. 2, but having omitted to comply with the provisions of the 7 & 8 Geo. 4, c. 71, s. 1, the plaintiff became entitled to have the money paid out to him. The plaintiff having availed himself of this right, the defendant afterwards comes to the court and asks that the money in the plaintiff's hands might be considered and dealt with as bail. In this attempt he is unsuccessful. Down to this time the cause has received no legal determination; and it is clear that all costs of motions in the course of the cause, where no express mention is made of costs, are costs in the cause, and payable to the party ultimately successful—*Johnson* v. *Closs*, 1 Chitt. 559; 2 Hullock on Costs, 625. The plaintiff was entitled to treat the money received by him as payment pro tanto, and to go on with the suit (the defendant having entered an appearance) for any demand for interest or otherwise that he might have beyond the amount paid into court, so long as by the practice the cause is in court. The defendant, desirous of concluding the matter, comes to the court, and prays that, upon payment of costs to be taxed, the bill may be delivered up to him. This the plaintiff does not oppose, and the rule is made absolute. Then, and not till then, the cause has arrived at its legal termination. What pretence is there for saying that the costs of the former rules were not costs incurred in the progress of the cause? or what right had the Master to exercise a discretion upon a matter on which the court had already expressly adjudicated?

TINDAL, C. J.—This rule prays for a review of the taxation, upon two distinct grounds—first, that the Master

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has disallowed the plaintiff the costs of the rule of Michaelmas Term last, for delivering up the bill of exchange upon which the action was brought to the defendant—secondly, that he has also disallowed the costs of two rules that were disposed of in Easter and Michaelmas Terms, 1837, in which no mention was made of costs.

With respect to the rule of last Michaelmas Term, inasmuch as the payment of costs was the condition upon which the rule was asked for and granted, I think the plaintiff must be allowed them.

But, as to the two former rules, I am of opinion that the Master has properly disallowed them. The plaintiff certainly was not by the terms of the rules themselves entitled to the costs; for, both were silent as to costs: nor can he claim them under the rule of Michaelmas Term last. If entitled at all, it must be on the general principle that the costs of rules moved in the course of a cause, in which no mention is made of costs, are costs in the cause. But, under the peculiar circumstances of this case, it appears to me that the rules in question were not rules made in the course and progress of the cause. The facts are these:—The defendant having paid into the sheriff's hands 200*l.* for the debt, and 10*l.* for costs, but having neglected to pay in the additional 10*l.* under the 7 & 8 Geo. 4, c. 71, the plaintiff obtained a rule to have the money paid out to him. At that period the plaintiff had his option either to abandon the cause, or to enter an appearance or file common bail for the defendant, and proceed. But, on the subsequent occasion, when the defendant applied to the court to have the money so taken out by the plaintiff considered equivalent to bail to the action, and sought to go on, the plaintiff opposed it, on the very ground that the statute entitled him to decline further to proceed with the action, and that his omission to enter an appearance or file common bail for the defendant was an election on his part not to go on. It is now con-

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tended that the cause must be considered to be in court until disposed of by a legal termination. But, in the situation in which these parties stood, there could be no legal termination of the suit, according to the ordinary meaning of the term. No appearance had been entered; for, the appearance entered by the defendant was irregular: and no judgment could be had by either party. I do not see how it was possible that the provisions of the 43 Geo. 3, c. 46, s. 2, could be complied with: it enacts, in the latter part of it, that, in case the defendant shall not duly put in and perfect bail to the action, then and in such case the money so deposited and paid into court, shall, by order of the court, upon motion to be made for that purpose, be paid over to the plaintiff in the action, who shall be thereupon authorized to enter a common appearance or file common bail for the defendant, if the said plaintiff shall so think fit; such payment to the plaintiff to be made subject to such deductions, if any, from the sum deposited and paid to answer the costs as aforesaid, as, upon the taxation of the plaintiff's costs, as well of the suit as of the application to the court in that behalf, may be found reasonable. The statute appears to contemplate an application on the part of the defendant to obtain back a portion of the 10*l.* deposited for costs, and not to allow the plaintiff to take out the money and go on to increase the costs beyond that sum. It seems to me, therefore, that the ordinary legal termination of the suit was not to be looked for in this case: but that the cause must be taken to have been put an end to from the moment the plaintiff took the money out of court and declined to adopt the course pointed out by the statute for continuing the suit.

BOSANQUET, J.—I am of the same opinion upon both points. The rule of Michaelmas Term last was drawn up on payment of costs: there can be no pretence therefore

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for depriving the plaintiff of the costs of that rule. The costs of the other rules, in which no mention was made of costs, for the reasons given by my Lord, appear to me not to fall within the description of costs in the cause.

COLTMAN, J.—I am also of opinion that the plaintiff is entitled to the costs of the last rule, but not to those of the two former.

ERSKINE, J.—I am of the same opinion. By the terms of the rule of last Michaelmas Term, the plaintiff is clearly entitled to have the costs of that rule taxed; but the terms of that rule do not include, neither do they expressly exclude, the costs of the two former rules: these therefore must be regulated by the ordinary practice. The plaintiff insists that he is entitled to them, because he says they are costs of rules in the progress of the suit in which no mention is made of costs. But it appears to me that they are not in the ordinary sense costs incurred in the progress of the suit. According to the true construction of the statute 43 Geo. 3, c. 46, s. 2, it seems to me, that, where the plaintiff takes out of court the money deposited with the sheriff, and declines to avail himself of the option of continuing the suit by entering a common appearance or filing common bail for the defendant, he cannot have more costs than the 10*l.* If my Brother Wilde's argument were to prevail, he would be getting more. I therefore think that the costs of the two rules of Easter and Michaelmas Terms, 1837, were properly disallowed. As to the costs of the last rule, however, the Master must review his taxation.

Rule absolute accordingly.

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Monday, April 22nd.

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THIS was an action of covenant. The declaration stated, that, on the 16th December, 1837, by an agreement then made *by and between the defendant of the one part, and the plaintiff of the other part,* the defendant, for the considerations therein mentioned, covenanted that he would, within the space of one month then next ensuing, well and effectually, by indenture, demise to the plaintiff, his executors, administrators, and assigns, two messuages with the appurtenances, at Rochester, to hold from the 25th December then next, for the term of ten years, at the yearly rent of 100*l.*, payable quarterly: and it was agreed that in the said indenture there should be contained covenants on the part of the plaintiff to pay the yearly rent, and also to repair the said messuages, &c.; that the plaintiff should take the fixtures belonging to the premises at a valuation; that he should abstain from carrying on certain trades therein; and also that he should insure them during the continuance of the term: and it was also agreed that the said indenture should contain a proviso for re-entry for non-payment of the rent, and all other usual and reasonable covenants, including a covenant on the part of the defendant for quiet enjoyment of the premises by the plaintiff during the said term, upon payment of the yearly rent and performance of the covenants: and the plaintiff for himself did by the said agreement covenant with the defendant to accept such lease upon the terms and conditions in the agreement above specified, and execute a counterpart thereof, and bear and pay the expenses of making the said lease and counterpart, and of the said agreement and a counterpart thereof, the said lease and counterpart to be

An agreement, purporting to be made "between the defendant, G. M., and J. H., devisees in trust under the will of G. M., of the one part, and the defendant of the other part," but executed only by the plaintiff and defendant, was declared upon as a deed made "between the defendant of the one part, and the plaintiff of the other part:"—Held that this was such a misdescription as the judge at Nisi Prius had power under the 3 & 4 Will. 4, c. 42, s. 23, to amend.

By the agreement the defendant covenanted that he and the other parties would within a given time demise certain premises to the plaintiff, the indenture to contain certain covenants; and the plaintiff covenanted to accept the lease, and execute a counterpart thereof, and bear and pay the expenses of making the lease and counterpart and agreement: *and, for the true performance of the agreement, each of the parties bound himself unto the other in the penalty of 500l., to be recovered against the defaulter as liquidated damages*:—Held, that this was a *penalty*, and not *liquidated damages*.

repared by the solicitor of the defendant: and for the rue performance of the agreement, each of the parties ound himself unto the other in the *penalty* of 500*l.*, *to be ecovered against the defaulter as liquidated damages:* and he plaintiff averred that he was always ready and willing o accept such lease as aforesaid, upon the terms and conitions above specified, and to execute a counterpart hereof, and to bear and pay the expenses of making the ease and counterpart, and of the agreement and a counterart thereof; of all which premises the defendant had otice; but that the defendant did not, although often equested so to do, within the space of one month after naking the agreement, well or effectually, by indenture, r otherwise, demise to the plaintiff the said messuages tc.; but wholly neglected and refused so to do: by means f which premises the defendant became liable to pay to he plaintiff the sum of 500*l.*, after the expiration of one nonth from the time of making the said agreement, on equest; and, although the said period of one month from he time of the making of the said agreement had elapsed efore the time of the commencement of this suit, yet the lefendant, although often requested so to do, had not as yet paid the said sum of 500*l.*, or any part thereof, to the plaintiff.

The defendant pleaded non est factum.

The cause was tried before Vaughan, J., at the sittings in London in Easter Term last. The agreement (which was under seal) was produced: it purported to be an agreement between the defendant and G. Moody and J. Morrish, devisees in trust under the will of George Miller, late of Strood, of the one part, and the plaintiff of the other part. The plaintiff and defendant were the only executing parties.

On the part of the defendant, it was insisted that the agreement was misdescribed in the declaration, and that the variance was not one that the judge had, under the

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3 & 4 Will. 4, c. 42, s. 23, power to amend. The learned judge was inclined to think the objection well founded: but he directed a verdict to be entered for the plaintiff for the 500*l.*, subject to a motion.

Talfourd, Serjeant, in Easter Term last, accordingly moved to enter a nonsuit, on the ground of variance, or that the judgment might be arrested, on the ground that there ought to have been an assessment of damages under the 8 & 9 Will. 3, c. 11, s. 8—the stipulation for the payment of 500*l.* being in the nature of a penalty, and not liquidated damages.—Upon the first point, he cited *Readshaw* v. *Wood*, 4 Taunt. 13, where it was held that an averment of a judgment obtained against A. B., is not proved by evidence of a judgment against A. B. and C. D.; and upon the second, *Hardy* v. *Bern*, 5 T. R. 636, *Smith* v. *Dickenson*, 3 B. & P. 630, and *Kemble* v. *Farren*, 3 M. & P. 425, 6 Bing. 141.

Amendment.

Bompas, Serjeant, *Erle*, and *Dowling*, now shewed cause. The agreement being executed by Ancell alone, was substantially the agreement of himself only, and not that of himself and his co-trustees; and therefore it was properly described in the declaration. [*Coltman*, J.—Must you not state the agreement truly?] A party is bound to state truly that which he undertakes to state. Here, the complaint is that Ancell only made default; whether his co-trustees also made default or not, is quite immaterial. Suppose, instead of an action upon an agreement under seal, this had been an action against one upon a promissory note signed by three, might not the plaintiff state that that one promised to pay, without taking any notice of the others? [*Bosanquet*, J.—One in that case might pay the money: but here a demise by Ancell alone would not do.] It is not the less a covenant that *he* will demise, because he covenants that he and others will demise. At all events, this is clearly a case for an amendment under the statute.

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Liquidated damages.

The amendment would in no degree vary the line of defence.

In order to see whether a stipulated sum shall be recovered as liquidated damages, or shall be considered merely as a penalty, the court will look at the nature of the agreement between the parties. Where the sum is to be paid in the event of the failure of either party to perform a single act, it may be recovered as liquidated damages, notwithstanding the word "penalty" be found in other parts of the instrument; but, where the forfeiture is to attach on failure to perform any one or more of several acts of various degrees of importance, the use of the term "liquidated damages" will not prevent the sum from being considered in the light of a penalty. *Reilly* v. *Jones*, 1 Bing. 302, 8 Moore, 244, is in principle very nearly identical with the present case. There, the plaintiff and defendant entered into articles of agreement, by which the former, in consideration of 2300*l.*, agreed to sell to the latter the lease of a public-house, as he then held the same, for the expiration of his term therein, and also his goods, fixtures, and effects, at a valuation; and the defendant agreed to take an assignment of the lease, and pay the 2300*l.*, as also the amount of the valuation of the goods, fixtures, and effects, and take possession of the premises on a given day, when the plaintiff agreed to give up possession of the said premises, goods, and effects, to assign licenses, to repair or allow for all damaged outside windows, and to clear out the rent and taxes to the day of quitting possession; the expenses of the agreement to be paid by the parties in equal moieties; and it was lastly agreed, that, on either party's not fulfilling all and every part of the agreement, he should pay to the other 500*l.*, thereby settled and fixed as liquidated damages: it was held that this latter sum was not a mere penalty to cover such damages as might be actually incurred by the non-performance thereof, but that, on a breach by the defendant

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in refusing to accept an assignment of the lease, or take possession, he was liable to pay the plaintiff the full amount of that sum. In *Astley* v. *Weldon*, 3 B. & P. 346, Heath, J., says, that "it may be laid down as a general principle, that, where articles contain covenants for the performance of several things, and then one large sum is stated at the end, to be paid upon breach of performance, that must be considered as a penalty; but that, where it is agreed, that, if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." In that case, as well as in *Smith* v. *Dickenson*, 3 B. & P. 630, *Kemble* v. *Farren*, 3 M. & P. 425, 6 Bing. 141, *Horner* v. *Graves*, 5 M. & P. 768, 7 Bing. 735, and *Davies* v. *Penton*, 6 B. & C. 216, 9 D. & R. 369, the language of the respective agreements was such that the courts could not give effect to them, except by construing the stipulated forfeiture to amount to a *penalty*. But, in *Crisdee* v. *Bolton*, 3 C. & P. 240, in an agreement for the sale of a public-house, it was stipulated that the seller should not be concerned in carrying on the business of a publican within a mile from the house he had sold, "under the penal sum of 500*l*., the same to be recovered as and for liquidated damages:" the seller opened a public-house three quarters of a mile from his former premises: and, though the plaintiff offered no evidence of actual damage, and the defendant's witnesses stated that the plaintiff had spoken of the injury as inconsiderable, it was held that the whole sum was recoverable as stipulated damages: and the jury having given the whole sum, the court refused to disturb the verdict. Here, the agreement is for the performance of a single act on either side—the execution of a lease by the defendant, and the acceptance of it by the plaintiff. It might be difficult in such a case for the plaintiff to shew the exact amount of loss or damage sustained in consequence of a breach of this agreement; and therefore this case does not fall within any of those

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where the sum agreed to be payable has been held to be a mere penalty. [*Coltman*, J.—Would the non-payment of the attorney's bill for preparing the lease and counterpart, be such a breach as would render the defendant liable to the whole penalty?] That would not be a substantial breach of the agreement.

Talfourd, Serjeant, and *Henderson*, in support of the rule. The variance in this case is not one that the court in the exercise of the discretion given them by the statute will amend. It is not a matter "not material to the merits of the case, and by the mis-statement of which the opposite party cannot have been prejudiced." It is a substitution of an entirely new contract. It is such a misdescription as would prevent the defendant from pleading performance, if he were otherwise in a condition to do so. [Upon the other point they were stopped by the Court.]

As to the proposed amendment.

TINDAL, C. J.—It appears to me to be unnecessary to consider whether or not the variance relied on in this case is fatal or not, because I am satisfied it is one which the judge had authority under the statute 3 & 4 Will. 4, c. 42, s. 23, to amend at the trial, the misdescription being wholly immaterial to the merits, and such that an amendment could in no way prejudice the defendant in his defence to the action.

Amendment allowed.

The main question, however, is, whether the sum agreed between the parties to be paid on a breach of the agreement by either of them, is to be considered as a penalty or as liquidated damages. We are in fact now called upon to decide the precise question that was left undetermined in *Horner* v. *Graves*, 5 M. & P. 768, 7 Bing. 735. Two of the cases that have been cited appear to me to lay down the rule by which this case must be governed—viz. that, where the scales are so evenly balanced that it is difficult to determine the precise meaning of the words used, we must look at the rest of

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the agreement, and endeavour thence to collect what is the intention of the parties. Is the matter here left in equilibrio? [His lordship read the agreement.] Now, it appears to me to be perfectly clear that the parties must have intended that this sum of 500*l.* should be a penalty only, and not liquidated damages; for, it would not only attach on the defendant's refusal to grant the lease, but also on the plaintiff's refusal to pay the expenses of preparing the lease and counterpart: and it would be absurd to suppose that the parties could have contemplated a penalty so unequal. The case appears to me to fall within the principle laid down by the court of King's Bench in *Davies* v. *Penton*, 9 D. & R. 369, 6 B. & C. 216, and by this court in *Kemble* v. *Farren*, 3 M. & P. 425, 6 Bing. 141. In the last mentioned case the action was brought upon an agreement made between the plaintiff and the defendant, whereby the defendant agreed to act as a principal comedian at the Theatre Royal, Covent Garden, during the four then next seasons, commencing in October, 1828, and also to conform in all things to the usual regulations of the said Theatre Royal, Covent Garden: and the plaintiff agreed to pay the defendant 3*l.* 6*s.* 8*d.* every night on which the theatre should be open for theatrical performances during the next four seasons, and that the defendant should be allowed one benefit night during each season, on certain terms therein specified. And the agreement contained a clause, "that, if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, each party should pay to the other the sum of 1000*l.*; to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal, should amount, and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof." In delivering judgment, the Court there say: "It is certainly difficult to suppose any words

precise or explicit than those used in the agreement, ıme declaring not only affirmatively that the sum of *l.* should be taken as liquidated damages, but nega- also, that it should not be considered as a penalty, or ɜ nature thereof; and, if the clause had been limited nfined to breaches of the agreement where the da- s would be of an uncertain nature and amount, we d have thought that it would have had the effect of :aining the damages upon any such breach at 1,000*l.*, 'e see nothing illegal or unreasonable in parties, by mutual agreement, settling the amount of damages, tain in their nature, at any sum upon which they ; agree. In some, indeed in many cases, such an ment fixes that which is almost impossible to be accu- ascertained, and in all cases it saves the expense and lty of bringing up witnesses at the trial to ascertain oint. But in the present case the clause is not so ıed, for it extends to the breach *of any stipulation by party*. If, therefore, on the one hand, the plaintiff eglected to make a single payment of 3*l.* 6*s.* 8*d.* per , or, on the other hand, the defendant had refused to rm to any usual regulation of the theatre, however :e or unimportant, it must have been contended that ause in question, in either case, would have given the ated damages of 1,000*l.* But that a very large sum l become immediately payable, in consequence of the ayment of a very small sum, and that the former l not be considered as a penalty, seems to be a con- tion in terms, the case being precisely that in which . of equity have always relieved, and against which . of law have also, in modern times, endeavoured to , by directing juries to measure and assess the da- actually sustained by the breach of the agreement." refore seems to me that the sum in question was a y only; and, as the jury have not assessed the damages sustained, the cause must go down again.

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BOSANQUET, J.—Supposing the variance to be such as before the statute would have caused the plaintiff to be nonsuited, inasmuch as it does not affect the merits or prejudice the defence, it is one that the judge had power to amend.

This brings us to the question whether the 500*l.* is in the nature of a penalty or stipulated damages. Upon this subject there have been many decisions, some of which are not quite reconcileable with each other. We must look at the agreement itself, to see whether it would be consistent with the intention of the parties to hold this to be liquidated damages. The strongest case in favour of the plaintiff is that of *Reilly* v. *Jones*, 8 Moore, 244, 1 Bing. 302. There, however, the words "penalty" and "penal sum" are not to be found. The agreement, which was for the sale of a public-house, after stipulating for the performance by the parties of various things connected with the transfer of the property, concluded with these words—"Either of them not fulfilling all and every part, the party not fulfilling shall pay unto the other the sum of 500*l.*, hereby settled and fixed as liquidated damages:" the court considered that sum not to be a mere penalty to cover such damages as might be actually incurred by the nonperformance thereof, but that, on a breach by the defendant, in refusing to accept an assignment of the lease, or take possession, he was liable to pay the plaintiff the full amount of that sum. One of the stipulations in that case certainly was, that the expenses of carrying the agreement into effect should be paid by the parties in equal moieties; and so far the case resembles this. On the other side, we have *Horner* v. *Graves*, 5 M. & P. 768, 7 Bing. 735, where the point was discussed very much at length, but not determined. Then we have *Davies* v. *Penton* and *Kemble* v. *Farren*: in the former the words were—"for the true performance of all and singular the agreements aforesaid, each of the parties did thereby bind and oblige himself unto the other of them

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in *the penal sum* of 500*l.*, to be recoverable for the breach of the said agreement, in any court or courts of law, as and by way of *liquidated damages*;" and in the latter—"that, if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained, each party should pay to the other the sum of 1000*l.*; to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount, and which sum was thereby declared by the said parties to be *liquidated and ascertained damages*, and *not a penalty or penal sum*, or in the nature thereof." And the courts, nevertheless, felt themselves at liberty to look into the respective agreements, in order to ascertain the real intention of the parties. The principle established in the last-mentioned case is this, that, where the agreement contains several stipulations of various degrees of value and importance, the sum declared payable on a breach of any one of them shall not be considered as stipulated damages, but merely as a penalty. The agreement in the present case provides for the granting of a lease by the defendant to the plaintiff; and it goes on to state the nature of the covenants to be contained in the proposed lease. It may be that the object of the parties in stipulating for a penalty, was, to enforce the grant or the acceptance of the lease. But the agreement goes on to provide that the plaintiff "shall bear and pay the expenses of making the said lease and counterpart, and of the said agreement and a counterpart thereof." Would not the penalty be incurred by a neglect or refusal to pay these expenses?

COLTMAN, J.—As to the first point, I feel no doubt as to the power of the judge at the trial to amend the declaration. And, with respect to the second, and the more important question, it seems to me that the rule upon the subject is now tolerably definite and intelligible. To entitle

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a party to recover a sum named in this manner as stipulated damages, there must be an express appropriation to a specific breach; where it is equally applicable to the failure to perform several things of various degrees of importance and value, it can only be held a penalty. If we were at liberty to indulge in conjecture, I should have little hesitation in saying that the parties intended the 500*l.* to be paid as liquidated damages on the failure of either to perform the substantial part of the agreement, viz. the execution of the lease and counterpart. But we are not entitled so to deal with the matter: we must ascertain the legal meaning of the words the parties have used. Now, looking at this instrument, the agreed damages are equally applicable to the plaintiff's failure to pay the expenses of preparing the lease and counterpart, as to the more substantial breach before alluded to. It seems to me, therefore, that the only way of doing full justice between the parties, is, to hold the sum here mentioned to be a penalty.

ERSKINE, J.—I am of the same opinion. There are two cases upon this subject determined in this court, that are very much opposed to each other, viz. *Reilly* v. *Jones* and *Kemble* v. *Farren*. In the former, the word *penalty* did not occur in the agreement; and, although many things were stipulated to be done by the defendant (taking the stock &c. at a valuation, repairing or allowing for damaged outside windows, &c.,) besides accepting an assignment of the lease, yet the court held the 500*l.* to be liquidated damages, and not a mere penalty. The ground of that decision was, that "liquidated damages" was the term, and the only term, used in the agreement; and the court said that no case could be found where such expressions had been disregarded. But, in *Kemble* v. *Farren*, where the words used were very strong—"that, if either of the parties should neglect or refuse to fulfil the said agreement, or any part thereof, or any stipulation therein contained,

each party should pay to the other the sum of 1,000*l.*; to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal, should amount, and which sum was thereby declared by the said parties to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof"—the court held that it would be unreasonable to construe it otherwise than as a penalty, inasmuch as it would by the terms of the agreement attach not only to a substantial breach, but also to many other stipulations some of which were of very small importance. The language of the agreement in the present case differs widely from that of those in those two cases: it more nearly resembles that of the agreement in *Davies* v. *Penton*. The words there were—"for the true performance of all and singular the agreements aforesaid, each of the parties did thereby bind and oblige himself unto the other of them, in the *penal sum* of 500*l.*, to be recoverable for the breach of the said agreement, in any court or courts of law, as and by way of liquidated damages." Abbott, C. J., said: "Whoever framed this agreement seems to have had no very accurate notion of the distinction between a penalty and liquidated damages; for, the sum of 500*l.* is described in the same sentence as a *penal sum* and as *liquidated damages*. Now, both these expressions cannot be satisfied: the 500*l.* cannot be a penalty and also liquidated damages. We must therefore look to the whole of the agreement, in order to give proper effect to this language; and it seems to me that we must say that this is liquidated damages and penalty only to secure such damages as the party by whom default is made ought to receive [pay?] in justice, and not that this absolute sum of 500*l.* was payable at all events." And Holroyd, J., added: "If it be a penalty, the law will treat it as such, and the stipulation that it shall be recovered as liquidated damages will not prevent the party from insisting upon his being entitled to assess damages under the statute 8 & 9 Will. 3,

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c. 11, s. 8." That brings us to the question whether these parties are to be considered as having intended this sum to be a penalty. The rule laid down by Heath, J., in *Astley* v. *Weldon*, seems to me to be the true one: "Where articles," he says, "contain covenants for the performance of several things, and then one large sum is stated at the end, to be paid upon breach of performance, that must be considered as a penalty. But, where it is agreed, that, if a party do such a particular thing, such a sum shall be paid by him, there the sum stated may be treated as liquidated damages." Taking that to be a fair guide to the construction of this agreement, we must see whether the forfeiture does not attach upon a failure to perform several acts of various degrees of importance, so that the parties could not have intended it to be a mere penalty. On the one side, there was but one single act to be done, viz. the execution of the indenture by the defendant: but, on the other hand, the plaintiff was not only to execute a counterpart, but he was also to pay the expenses of preparing the agreement, lease, and counterpart. Now, had he refused to pay these expenses, he would have failed in performance of the agreement: and, could it be said that the full penalty was meant to attach for this breach? I agree with my Brother Coltman as to the probable intention of the parties to limit the damages to the substantial breach of the contract: but the language of the agreement is such as to make it attach equally to the minor breach. I therefore agree that the damages should have been assessed.

It was agreed that the damages should be entered as if formally assessed by the jury at 1*s*.

Rule accordingly.

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Tuesday, April 23rd.

LONGDEN *v.* CROOTS.

To a writ of false judgment upon a judgment pronounced in the county court of Yorkshire, the sheriff returned that the defendant "had not given him security to prosecute his suit," &c.: —The court quashed the return.

The 6th section of the statute 19 Geo. 3, c. 70, applies only to causes removed from the inferior court *before* judgment.

And, semble, that its operation is confined to causes removed from inferior courts *of record*.

THIS suit was commenced by writ of justicies in the county court of Yorkshire. Upon the judgment obtained in that court the defendant sued out a writ of false judgment, to which the sheriff, construing literally the formal words at the beginning of the writ, "If William Longden shall give you security to prosecute his suit, then" &c., returned as follows:—"The within named William Longden hath not given me security to prosecute his suit, whereby I am prevented from causing the aforesaid plaint to be recorded" &c.

Erle, in the last term, obtained a rule nisi to quash this return, for insufficiency, with costs.

W. H. Watson now shewed cause.—The return is sufficient. The writ requires the plaintiff to give security. [*Tindal*, C. J.—No security is by law required, or ever in fact taken.] It is sworn that it is the uniform practice in the county court of Yorkshire to require security previous to the plaint being recorded. By the statute 19 Geo. 3, c. 70, s. 5, it is enacted that "no execution shall be stayed or delayed upon or by any writ of error, or supersedeas thereon to be sued, for the reversing of any judgment given or to be given in any inferior court of record, where the damages are under 10*l.*, unless such person or persons in whose name or names such writ of error shall be brought, with two sufficient sureties, such as the court (wherein such judgment is or shall be given) shall allow of, shall first, before such stay made or supersedeas to be awarded, be bound unto the party for whom any such judgment is or shall be given, by recognizance to be acknowledged in the same court, in double the sum adjudged to be recovered by the said former judgment, to prosecute the said writ of

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error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the said writ of error be non-prossed) all and singular the debt, damages, and costs adjudged or to be adjudged, and all costs and damages to be awarded for the same delaying of execution." And by s. 6, it is further enacted "that no cause where the cause of action shall not amount to the sum of 10*l.* or upwards, shall be removed or removable into any superior court, by any writ of habeas corpus, or otherwise, unless the defendant, who shall be desirous of removing such cause, shall enter into the like recognizance for payment of the debt and costs, in case judgment shall pass against him." In *Grimshaw* v. *Emerson*, 1 Dowl. 337, it was held, that, where a pone has issued for the purpose of removing a plaint out of the county court, and the sheriff has proceeded with the plaint, the defendant, in order to obtain an attachment against the sheriff, must shew that the recognizances required by the 19 Geo. 3, c. 70, s. 6, have been entered into by him. That case is an authority to shew that the 6th section of the statute applies to courts not of record. [*Tindal*, C. J.—There the cause had not, as here, arrived at judgment. What do you want security for? No costs are allowed on a writ of false judgment.] The very circumstance of no costs being given in false judgment, might have induced the legislature to impose the condition of security being given for the debt and costs in the court below.

Erle, in support of his rule.—The statute does not apply to courts not of record; neither does it apply to process for the removal of the cause after judgment. [*Coltman*, J.—If the first part of your proposition be correct, the case of *Grimshaw* v. *Emerson* was wrongly decided.] Neither judge or counsel there adverted to the distinction between courts of record and courts not of record. At all events, this case stands clear of that, this being a removal of the plaint after

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judgment. The only writs mentioned in the statute are writs of error and habeas corpus; and these apply only to courts of record. The fact of a "recognizance" being required, is decisive; for, a recognizance can only be taken in a court of record: the sheriff has no authority, either at common law or by any statute, to take recognizances. In *Mitchell* v. *Mitchinham*, 1 B. & C. 513, 2 D. & R. 722, it was held that a habeas corpus cum causâ does not lie to remove the proceedings from an inferior jurisdiction into the court of King's Bench, unless it appears that the defendant is actually or virtually in the custody of the court below.

TINDAL, C. J.—I am of opinion that this case does not fall within the statute 19 Geo. 3, c. 70. The 4th, 5th, and 6th sections of that act all apply to the same subject-matter, viz. the removal of causes from inferior courts of record. The fourth section enacts, "that, in all cases where final judgment shall be obtained in any action or suit in any inferior *court of record*, it shall and may be lawful to and for any of his majesty's courts of record at Westminster, upon affidavit made and filed therein of such judgment being obtained, and of diligent search and inquiry having been made after the person or persons of the defendant or defendants, or his, her, or their effects, and of execution having issued against the person or persons, or effects, as the case may be, of the defendant or defendants, and that the person or persons, or effects, of the defendant or defendants are not to be found within the jurisdiction of such inferior court, to cause the record of the said judgment to be removed into such superior court, to issue writs of execution thereupon to the sheriff of any county," &c. "Provided always (s. 5) that no execution shall be stayed or delayed upon or by any writ of error, or supersedeas thereon to be sued, for the reversing of any judgment given or to be given in any inferior *court of record*, where the damages are under 10*l.*, unless such person or persons in whose name

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or names such writ of error shall be brought, with two sufficient sureties, such as the court (wherein such judgment is or shall be given) shall allow of, shall first, before such stay made or supersedeas to be awarded, be bound unto the party for whom any such judgment is or shall be given, by recognizance to be acknowledged in the same court in double the sum adjudged to be recovered by the said former judgment, to prosecute the said writ of error with effect, and also to satisfy and pay (if the said judgment be affirmed, or the said writ of error be nonprossed) all and singular the debt, damages, and costs adjudged or to be adjudged, and all costs and damages to be awarded for the same delaying of execution." These two clauses clearly apply to cases where a judgment has been obtained. The 6th section, taking up the case where judgment has not been obtained, enacts " that no cause where the cause of action shall not amount to the sum of 10*l.* or upwards, shall be removed or removable into any superior court by any writ of habeas corpus, or otherwise, unless the defendant, who shall be desirous of removing such cause, shall enter into the like recognizance for payment of the debt and costs in case judgment shall pass against him." It appears to me that this latter clause clearly points at a case where judgment has not been given in the court below. Whether or not *Grimshaw* v. *Emerson* was rightly decided in the other respect, it is unnecessary to say: very strong reasons might be urged to shew that it was a case within the statute. I think the rule for quashing the return must be made absolute. It is not, however, a case for costs. And the sheriff may have a week to make a better return.

BOSANQUET, J.—I am of the same opinion. The 6th section clearly applies only to causes removed before judgment; and I am strongly inclined to think it was intended to embrace only the same description of causes as the 4th

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nd 5th sections, viz. causes arising in inferior courts of ecord. The mention of "recognizance" seems very much o militate against the idea of its application to proceedings n a court not of record. But it is not necessary on this ccasion to decide that.

COLTMAN, J.—I am of the same opinion. Had it been he intention of the legislature to throw any impediment n the way of the writ of false judgment, some provision to hat effect might have been expected to be found in the 6th section. It seems to me that the proper construction f the 6th section is that which has been put upon it by ny Lord and my Brother Bosanquet, viz. that it is confined o causes removed before judgment.

ERSKINE, J.—I am also of opinion that the 5th section pplies to the removal of causes *after* and the 6th *before* udgment: and I think both sections relate to courts of ecord only.

Rule absolute accordingly

LAWRENCE and Another, Assignees of WILLIAM OKILL, a Bankrupt, *v.* KNOWLES.

Tuesday, April 23rd.

THIS was an action of assumpsit brought by the plaintiffs, ssignees of William Okill, a bankrupt, upon two contracts

In an action by assignees of a bankrupt against the defendant for not delivering railway shares pursuant to a contract made with the bankrupt—the plaintiffs having in their declaration averred that the bankrupt before his bankruptcy, and the plaintiffs as his assignees since, were always ready and willing to accept and to pay for the shares—the defendant took issue upon this averment:—Held, that the plea was sustained by proof that before the time fixed for the performance of the contract, the bankrupt was in a state of total incapacity to pay the price agreed on, and that his effects produced no assets to the assignees.

A contract for the sale by the defendant to the bankrupt of railway shares was to be performed on the 1st July, 1835—To a declaration by the assignees for a breach of this contract in not delivering the shares, the defendant pleaded, that the assignees did not adopt the contract within a reasonable time after the bankruptcy, and averred that the contract was abandoned by mutual consent:—Held, that the circumstance of the assignees having suffered a considerable period to elapse without requiring the contract to be performed, was evidence whence the jury might infer an abandonment.

In such a case the assignees ought to make their election within a reasonable time; and *semble*, that, what is or is not a reasonable time, is a question for the jury.

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made by the defendant with the bankrupt in the years 1833 and 1834, for the sale to the latter of certain Grand Junction Railway shares.

First point.

The first count of the declaration was founded upon a contract dated the 12th June, 1833, whereby Okill, the bankrupt, agreed to purchase from the defendant sixty shares in the Grand Junction Railway, at 14*l.* 5*s.* per share, net payment, as follows, to wit, 155*l.* on the 15th June, 1833, and the remainder on the 19th June in the same year: the count averred, that, in consideration thereof, and that Okill promised to accept the shares and pay for the same, the defendant undertook and promised Okill before his bankruptcy to deliver and transfer the sixty shares to him on request; that Okill on the 15th June paid the defendant 155*l.*, in part, and afterwards and before his bankruptcy, and after the 29th June, to wit, on the 6th July, 1833, and on divers other days and times between that day and the 1st January, 1835, paid the defendant divers other sums of money, amounting in the whole to the sum of 585*l.*, in part payment of the price of the said sixty shares, which the defendant accepted, and waived the payment of the remainder on the 29th June, 1833; that, although the defendant delivered thirty-five shares, and Okill, before his bankruptcy, and the plaintiffs, as his assignees, after his bankruptcy, were always ready and willing to pay the remainder of the price, together with all calls made in respect of the shares, and the plaintiffs, as assignees, afterwards, and after the bankruptcy, to wit, on the 11th January, 1838, tendered the residue, together with the amount paid for calls &c., yet the defendant did not deliver the said shares.

Second count.

The second count was founded upon another contract, dated the 1st July, 1834, for the sale by the defendant to Okill of fifty Grand Junction Railway shares at 10*l.* premium—averring, that, in consideration that Okill would purchase the shares and accept the same on the 1st July,

1835, and would allow the defendant interest upon such calls as should be paid before that time, the defendant undertook and promised Okill to deliver him the said fifty shares on the said 1st July, 1835; and stating the bankruptcy of Okill on the 3rd February, 1835, and that the plaintiffs, as his assignees, were always on and after the said 1st July, 1835, ready and willing to pay the defendant for the said shares after the rate aforesaid, with interest upon calls paid from the 1st July, 1834, and afterwards, to wit, on the 11th January, 1838, tendered the moneys due, but that the defendant did not nor would deliver the fifty shares.

There was also a count for money had and received by the defendant to the use of the plaintiffs as assignees, and a count for money found due upon an account stated between the plaintiffs as assignees and the defendant — Third and fourth counts.

The defendant pleaded—first, non assumpsit, to the whole declaration. — First plea.

Secondly, to the first count, a traverse of the payment by Okill, and of the acceptance and receipt by the defendant of the several sums in the first count mentioned in part payment, and of the waiver of payment of the remainder on the 29th June, 1833, modo et formâ. — Second plea.

Thirdly, to the first count, a traverse of the allegation that Okill before his bankruptcy, and the plaintiffs as his assignees afterwards, were ready and willing to pay the remainder of the price, together with all sums paid for calls, modo et formâ. — Third plea.

Fourthly, to the first count, that the alleged tender in the first count was made at an unreasonable time after the alleged waiver, and that Okill, or the plaintiffs, within a reasonable time after the alleged waiver, were not ready and willing to pay the remainder of the price, and did not tender the same within a reasonable time after the waiver or after the 29th June, 1833—verification. — Fourth plea.

Fifthly, to the first count, that, after the making of the promises in the first count mentioned, and payment and — Fifth plea.

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delivery of the shares in part performance, and waiver by the defendant of the remainder of the price, and before the bankruptcy of Okill, mutual promises were made by Okill and the defendant, not to require further performance, and a mutual agreement thereupon to abandon the contract—verification.

Sixth plea. Sixthly, to the first count, that the plaintiffs as assignees did not, at the bankruptcy of Okill, or for a long time, to wit, six months, or in any reasonable time after the bankruptcy, adopt the contract, but declined so to do; with an averment of mutual promises, as in the fifth plea, each absolving the other from further performance of the contract.

Seventh plea. Seventhly, to the second count, a traverse of the allegation that the plaintiffs, as assignees, were ready and willing to pay the defendant for the shares, as in the second count mentioned, and made the tender in that count mentioned, or requested the defendant to deliver the shares.

Eighth plea. Eighthly, to the second count, that the alleged tender was made at an unreasonable time, and at a time unreasonably long after the 1st July, 1835, and that neither the plaintiffs nor any other persons were within a reasonable time after the said 1st July, 1835, ready and willing to pay, nor did they tender within a reasonable time after that day—verification.

Ninth plea. Ninthly, to the second count, that the plaintiffs, as assignees, did not adopt the contract within a reasonable time after the bankruptcy, and that the contract was mutually abandoned—verification.

Tenth plea. Tenthly, to the second count, that, after the thirty-five shares had been delivered to the plaintiffs, and whilst 115*l.* were due to the defendant, and before Okill's bankruptcy, to wit, on the 17th January, 1834, the defendant agreed to give Okill further time, until the acceptance thereinafter mentioned should become due; that the defendant would lend Okill a further sum, to wit, 285*l.*; that Okill

should give the defendant his acceptance for 400*l.*; that the defendant should hold the remainder of the said shares until Okill's acceptance should become due; and that, if the acceptance was not paid, the defendant should be at liberty to sell the shares: with an averment that the defendant did give further time, and did lend Okill 285*l.*, and that Okill gave his acceptance for 400*l.*, and made default; whereupon the defendant sold the remainder of the shares, according to the agreement—verification.

The eleventh plea traversed the bankruptcy of Okill. Eleventh plea.

The plaintiffs by their particulars of demand claimed in respect of the shares that were the subject of the first contract, 2,188*l.* 15*s.* 11*d.*, and in respect of those that were the subject of the second contract, 5,651*l.* 15*s.* 4*d.*

The cause was tried before Coleridge, J., at the Spring Assizes at Liverpool, in 1838. The two contracts as stated in the declaration were put in. On the back of the first was indorsed in the hand-writing of the defendant the several payments made by Okill at different times on account of that contract, amounting together to the sum mentioned in the first count. An account stated between Okill and the defendant was also put in: in this account the balance debited against Okill was 400*l.*, for which sum Okill gave his acceptance, payable on the 10th January, 1835. This bill was dishonored. A fiat in bankruptcy issued against Okill on the 3rd February, 1835; the plaintiffs were appointed assignees on the 23rd; and on the 22nd May following Okill obtained his certificate.

There did not appear to have been any communication between the bankrupt and the defendant on the subject of the first contract: but it appeared that in the months of July and September, 1835, the bankrupt called several times on the defendant touching the second contract, the time for the performance of which was the 1st July, 1835: the defendant told him he had no shares.

In October, 1885, Grand Junction Railway shares having

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advanced to 50*l.* premium, the plaintiffs began for the first time to evince a desire to enforce performance of the contracts. A negotiation was attempted, but failed. Nothing more was done until February, 1837, when the plaintiffs' attornies wrote to the defendant's attorney requesting him to admit a tender of the price of the shares, with calls and interest. This was declined. And in January, 1838, the defendant received the following letter from the plaintiffs' attornies:—

"We are again requested by the assignees of William Okill, a bankrupt, to write to you for the twenty-five shares, being the residue of the sixty shares in the Grand Junction Railway company sold by you to the bankrupt on the 12th June, 1833, and remaining yet undelivered; and also for fifty other shares in the said railway sold by you to the bankrupt on the 1st July, 1834. And we beg to state that the assignees are ready to pay you the balance owing to you for the same, with interest. Should it still be your intention to resist this demand, we will thank you to give us the name of the solicitor whom you intend to employ."

Shortly after the receipt of this letter, 2,771*l.* 4*s.* 1*d.*, and 5,748*l.* 4*s.* 8*d.*, were respectively tendered to the defendant, as the sums due for premiums, calls, and interest upon the two contracts: which he refused to receive.

The estate of the bankrupt had produced nothing approaching to these sums—his debts and liabilities amounting to 7,000*l.*, and his only available assets consisting of furniture of the value of 150*l.*: nor had any provision been made by either party for payment of the calls from the time when the contracts were to be performed until the date of the tender; though by the Railway act all shares the calls on which are not paid within a limited time, are declared to be forfeited.

When under examination before the commissioners, the bankrupt gave no account of the contracts in question.

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The bankrupt, who was called as a witness, expressly denied that there was any agreement between himself and the defendant, that the latter should sell the twenty-five shares if the 400*l.* bill was not duly paid, or that there was any agreement for the discharge of either of the contracts.

The learned judge told the jury that there appeared to him to be no evidence of any express agreement to discharge the contracts, or that the assignees refused to take to them: but he left it to them to say whether or not the bankrupt or the plaintiffs had been ready and willing within a reasonable time to adopt the contracts; telling them that they might infer an abandonment of the contracts from the unreasonable lapse of time.

The jury returned a verdict for the plaintiffs on the issues joined on the first and second pleas, and for the defendant on all the rest.

Creswell, in Easter Term last, moved for a rule nisi for a new trial, on the ground that the verdict was against evidence, unless the defendant would consent to a verdict being entered for the plaintiffs on the issues raised on the fourth and eighth pleas, and judgment non obstante veredicto on the remaining issues.—He submitted, that, as to the fifth, sixth, seventh, ninth, and tenth pleas, the alleged abandonment of the contracts was clearly disproved; and, as to the fourth and eighth, that, inasmuch as there was no evidence of any offer on the part of the defendant at any time to complete the contracts, all that it was necessary for the plaintiffs to prove, was, that they had tendered the price of the shares; that there is no mercantile usage limiting the time for the performance of a contract of this description; but that reasonableness of time is a question of law to be judged of by the court, by analogy to the statute of limitations. [A rule nisi having been granted—

Wilde, Serjeant, *Alexander*, *Crompton*, and *Knowles*,

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shewed cause.—If the assignees had intended to adopt the contracts in question, they should have done so forthwith. The only questions that could be submitted to the jury, were, whether the bankrupt or his assignees were during all the intervening time ready and willing to accept and to pay for the shares, and whether they had tendered the price within a reasonable time. Can it be wondered, that, under the circumstances, the jury negatived both these propositions? If reasonableness of time was a question of law, the opinion of the learned judge was correct—*Gomery* v. *Bond*, 3 M. & S. 378; if a question of fact, the conclusion the jury arrived at was clearly warranted by the evidence.

Plaintiffs bound to make their election within a reasonable time.

It is said that the question as to the reasonableness of time is to be determined by the court with reference to the statute of limitations. In all cases where the contract is silent as to the time of performance, the law implies the condition that it shall be performed within a reasonable time; for example, where the contract is for the sailing of a ship on a given voyage, it is an implied term in the contract that she shall sail within a reasonable time: so, in the case of insurance, an unreasonable delay in the inception of the risk avoids the contract: so in the case of contracts for the purchase of land (Sugden's Vendor and Purchaser, 6th edit., p. 341) or stock, or the election by assignees of a bankrupt to take or to abandon a lease: in all these cases the contract must be performed or the election made within a reasonable time, to be determined by a jury; and in no case can time be of more importance than in a contract for a commodity of such fluctuating and uncertain value as railway shares. The statute of limitations cannot be the true criterion: it merely bars the remedy (if the defendant choses to avail himself of it) for the breach of a contract after six years. Suppose the defendant does not plead the statute, is the contract to be open for ever? It would be most unjust and unreasonable to hold that the defendant was bound to keep these shares, and pay all calls

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upon them for a period of six years, and that then the assignees should have an option either to take or to reject them! Where an unreasonable length of time has elapsed, the jury may infer that each party has acted upon the assumption that the contract has been mutually abandoned. It is true there was no express evidence of an agreement here to abandon; but the conduct of the parties was enough to warrant the jury in inferring an abandonment: acts are stronger than words. [*Tindal*, C. J.—"Non quod dictum est, sed quod factum est, inspicitur."] In *Doloret* v. *Rothschild*, 1 Sim. & Stu. 590, it was held that time is of the essence of the contract, where the subject of the contract is of such a nature as to be exposed to a daily variation in its value: and this was recognized in *Rothschild* v. *Hennings*, 9 B. & C. 470 (95). *Ellis* v. *Thompson*, 3 M. & Welsby, 445, is precisely in point to shew that the law will imply that a mercantile contract is to be performed within a reasonable time. There, A., the proprietor of a lead mine called the Bog Mine, situate near Shrewsbury, sold to B., a lead merchant in London, by a written contract, "200 tons of Bog Mine lead, at 22*l.* per ton, deliverable in the river Thames." The broker who made the contract stated at the time, in answer to a question by B., that the lead was *ready for shipment*. A few days afterwards B. applied to the broker to know whether A. would agree to allow the freight or insurance *from Gloucester or Liverpool*, to which A. agreed; but B. subsequently required the lead to be delivered in London. It appeared that Gloucester and Liverpool were the usual ports of shipment for London; but the Bog Mine lead was first brought by barges down the Severn from Shrewsbury to Gloucester. The lead was delayed a considerable time in this part of its transit by the lowness of the water, and, when it arrived in London, B. refused to receive it, the price having fallen considerably. In an

(95) Over-ruling Hennings v. Rothschild, 4 Bing, 315, 12 Moore, 559.

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action by A. against B. for not accepting the lead, B. pleaded that the plaintiff was not ready to deliver it within a reasonable time, on which issue was joined. The broker stated (in addition to the above facts) that he had understood from A. that the lead was at Shrewsbury. The judge stated to the jury that it might be taken for granted that the understanding of the parties was that the lead was ready for shipment *at Gloucester or Liverpool;* that this was confirmed by the defendant's application as to the freight and insurance; and that, if they thought it ought to have arrived in a shorter time, if ready for shipment at Gloucester or Liverpool, the defendant was entitled to a verdict. It was held that the parol representation of the broker, that the lead was ready for shipment, was admissible in evidence, not to vary the written contract, but as one of the data from which the reasonableness of the time was to be determined. Lord Abinger there says: "The question of reasonable or not reasonable time is collateral to the contract. If the contract itself had disclosed anything about time, it might have explained all the circumstances; or, if the contract had contained any specification of the particulars from which the time could necessarily be inferred, in like manner it would exclude all parol communication that could alter such necessary inference. But, where the contract is entirely silent, how are you to judge of the reasonableness of the time, if you are to exclude all evidence whatever by which it is to be computed?" And Alderson, B., says: "There is no specification in the contract as to the time when the delivery is to take place, and therefore the law would imply that the delivery should take place within a reasonable time; and it is a question for the jury at the trial, and this was the question put to them, how the *reasonable time,* which is an implied part of the contract, is to be ascertained."

The evidence clearly shewed that it was the intention and understanding of both parties that the contracts should

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be abandoned, until the great rise in the price of the shares excited the cupidity of the assignees, and induced them to make this desperate attempt. It lay on the plaintiffs to shew that they were ready and willing at all times to accept and to pay for the shares. In *Mason* v. *Corder*, 7 Taunt. 9, it was held that it is incumbent on the vendor of a lease which contains a restriction against alienation, to prove that he has obtained the lessor's consent to the assignment. Gibbs, C. J., there said: "This action cannot be maintained, unless the plaintiff did offer, and was able, and shewed that he was able, to do that for which he had agreed. The plaintiff's counsel admits, and in so doing he has not admitted too much, that it lay on him to procure every thing necessary to make this assignment valid, namely, his landlord's consent." The only evidence given on the part of the plaintiffs to shew that they treated the contracts as existing, was that of Okill himself: the jury probably did not give credit to his testimony; but the court will not therefore grant a new trial—*Lacey* v. *Forrester*, 3 Dowl. 668. [It was conceded that the plaintiffs were entitled to the verdict on the first, second, tenth, and eleventh pleas.]

As to the third and seventh pleas.

Cresswell and *Wightman*, in support of the rule.—The first question, which arises upon the third and seventh pleas, is, whether the plaintiffs were bound to give affirmative evidence that they or the bankrupt were at any moment of time actually prepared with the money to pay for the shares. It is submitted that they were not: but that the meaning of the allegation is, that they never (the shares being tendered) expressed unwillingness to take or to pay for them. When a party pleads a tender, he usually avers that he was always ready and willing, and on a particular day tendered and offered, to pay the money: and, if the plaintiff takes issue upon the readiness and willingness, he must shew a precise period when the defendant was not ready to pay; it is not enough to shew circum-

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stances whence it may be conjectured that he was unable, and thence to assume that he was unwilling to pay. The fact of insolvency would not be evidence of want of readiness and willingness. The averment here clearly amounts to no more than this, that the plaintiffs were ready and willing to accept and to pay for the shares, whenever they should be called upon to do so. It did not appear that the defendant had ever called upon either the bankrupt or the plaintiffs to perform the contract; and the affirmative was on him.

As to the fifth and ninth pleas.

Not only was there no evidence that there had been any agreement or mutual understanding that the contracts should be rescinded; but the contrary was expressly proved by the bankrupt. *Gomery* v. *Bond*, 3 M. & S. 378, is relied on to shew that the conduct of the parties might operate a waiver of the contract. It may be conceded that any express act of the parties may operate a waiver; as, the acceptance of a new lease operates a release of a pre-existing one: but the doctrine cannot apply where there is nothing done on either side; an abandonment of a contract cannot be presumed from the mere silence of the parties.

Fourth and eighth pleas—reasonable time.

Reasonableness of time is not a question of fact, but a question of law, to be determined by the court with reference to the time within which the contract was capable of being enforced. Thus, in the case of notice of the dishonor of a bill of exchange, the courts have laid down the rule as to what is or is not a reasonable time—*Tindal* v. *Brown*, 1 T. R. 167; *Darbishire* v. *Parker*, 6 East, 3. The cases upon policies of insurance have no application here. In the contract of insurance there is an implied warranty that the ship shall sail within a reasonable time. If this were not so, a Winter risk might in some cases be substituted for a Summer risk. So, where the insurance is "at and from" a particular port, the vessel is supposed to be in preparation for an immediate voyage: a homeward policy

on freight *at and from A.*, attaches only when the ship is at A. in a condition to take in her homeward cargo—*Williamson* v. *Innes*, 8 Bing. 81, n., 1 M. & Rob. 88. But a contract to deliver goods, to pay money, to build a house, and the like, all stand upon a very different footing: the contract cannot be treated as rescinded merely because two or three years have elapsed without anything being done with reference to it. Courts of equity perhaps may say that they will not lend their aid to enforce a specific performance, unless it is sought for within a reasonable time. In *Doloret* v. *Rothschild*, there was a time fixed for the performance of the contract, and an express stipulation, that, unless the money was then paid, the deposit should be forfeited. But, how can time be said to be the essence of a contract where there is no time specified? In *Ellis* v. *Thompson*, 3 M. & Welsby, 445, it was considered to be a part of the contract that the lead was at the time ready for shipment. The principal contest in that case, was, whether or not the judge did right in receiving evidence adding a term to the written contract: but the judgment of the court proceeded mainly on the absence of objection to the evidence at Nisi Prius.

Money had and received.

At all events, the plaintiffs are entitled, upon the count for money had and received, to recover back the 240*l.* which was paid by the bankrupt beyond the price of the thirty-five shares delivered, as money paid upon a consideration that has failed. [*Wilde*, Serjeant, objected that this claim did not appear in the particulars of the plaintiffs' demand.]

TINDAL, C. J.—It appears to me that this rule may be decided on a ground by no means so wide as that embraced by the argument. If any one plea going to the whole cause of action has been properly found for the defendant, we cannot send the case down to another trial. Now, it seems to me that the issues upon the third plea (to the first count) and the ninth plea (to the second count), which do

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go to the whole cause of action in those counts respectively, have been properly found by the jury upon the evidence before them.

As to the third plea.

The first count of the declaration discloses a contract between the bankrupt and the defendant for the purchase of sixty shares in the Grand Junction Railway, at a certain price, to be delivered on a given day: it then goes on to aver that a part of the price was duly paid, and certain of the shares delivered; but that, although the bankrupt before his bankruptcy, and the plaintiffs, as his assignees, after his bankruptcy, were *always ready and willing* to pay the remainder of the price, together with all calls made in respect of the shares, and the plaintiffs as assignees after the bankruptcy tendered the residue, together with the amount paid for calls, &c., the defendant did not deliver the remaining twenty-five shares. This averment of the readiness and willingness of the plaintiffs to pay the residue of the price and the sums paid for calls was necessarily made; for, if the defendant had in the mean time paid any calls on the shares, he would have had a lien upon them to the extent of the money so paid: and a distinct issue is by the third plea raised upon this averment. Upon the evidence, it appears to me that the jury were warranted in concluding that Okill before his bankruptcy was not always ready and willing to pay the remainder of the price, together with the amount of calls: for, it appears, that, in January, 1834, he borrowed 285*l.* from the defendant to enable him to pay calls on the thirty-five shares, giving him his acceptance for 400*l.*, which, when it became due in January, 1835, was dishonoured. It seems to me that that was abundant evidence to warrant the jury in finding that he was not always ready and willing to accept and to pay for the shares: and, therefore, the third plea being clearly made out, it is unnecessary to say whether or not any of the subsequent pleas were established.

As to the ninth plea.

The ninth plea, which is pleaded to the second count,

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alleges that the plaintiffs, as assignees, did not adopt the contract within a reasonable time after the bankruptcy, and avers a mutual agreement to abandon it. The question upon this plea is, whether there was sufficient evidence before the jury to justify a verdict for the defendant. The contract was to be performed on the 1st July, 1835. On the 6th February in that year Okill became bankrupt. A considerable time therefore intervened between the bankruptcy and the time at which the contract was to have been performed. It would be too much, perhaps, to say that on the arrival of the 1st July, the assignees were bound instanter to elect whether they would adopt the contract or not: but, at all events, they were bound to do so within a reasonable time. Even in the case of a lease, the assignees are bound to elect whether they will take to or abandon it within a reasonable time: and in *Ex parte Scott*, 1 Rose, 446, n., ten days was considered a reasonable time for them to make their election. Without laying down any precise time within which the plaintiffs in this case should have made their election, it is enough to say that the jury were warranted in concluding, from the delay that took place, that the contract had been abandoned. From July, 1835, till October, 1836, nothing appears to have been done; and then a mere conditional offer was made, but rejected. The next step taken was in February, 1837, when the defendant was asked to admit a tender, which he declined to do. Then all is wrapped in a death-like slumber till January, 1838, when the tender was made, and the present action brought. It does appear to me that the interval between July, 1835, and January, 1838, was abundantly sufficient to justify a presumption by the jury that the contract had been abandoned, and therefore that the verdict was properly found for the defendant upon the ninth plea also.

Money had and received.

With respect to the claim for the 240*l.*, we are not called on upon the present rule to decide as to that. It

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is not claimed in the bill of particulars, neither was it mentioned at the trial, or when the rule was moved for.

BOSANQUET, J.—I am of the same opinion. All that it is necessary for us to decide, is, whether the verdict is or is not warranted upon any issue that goes to the whole cause of action. The third plea traverses the allegation in the first count, that the bankrupt before his bankruptcy, and the plaintiffs since, were always ready and willing to pay the residue of the price, together with all sums paid for calls in respect of the shares. It is contended, on the part of the plaintiffs, that it was necessary for the defendant, in order to establish the affirmative of that allegation, to shew that there had been a distinct demand and refusal. It may be, that, in ordinary cases, where a man is solvent, it may be presumed, until the contrary appears, that he is ready and willing to perform his engagements. But that must depend upon circumstances: and I cannot conceive any circumstance more cogent than an absolute incapacity to indicate a want of readiness to fulfil a contract. The party must not only be willing, but he must be ready also: and, when he is shewn to be utterly incapable, he is shewn to be not ready to do that which he has engaged to do. There was abundant evidence to shew that the bankrupt was incapable; and also to shew that the assignees had no assets to enable them to perform the contracts.

As to the third plea.

As to the ninth plea.

I am also of opinion that the evidence sustained the ninth plea. A parol contract may be discharged by parol; and the fact of the contract being discharged or abandoned may be proved otherwise than by words: the conduct and circumstances of the parties, and their relative situation with regard to each other, are all to be taken into consideration. Here is the case of a bankrupt making extensive engagements which he has no means of fulfilling. His assignees were justified in declining to adopt those contracts: but they were bound, if they intended to avail

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iemselves of them, to make their election so to do within reasonable time. It would be most unreasonable and njust to hold that the plaintiffs had a right to withhold ıe declaration of their election for so long a period as that hich has been suffered to elapse here. The whole of the rcumstances were before the jury, and there is no suggesion that the case was not properly left to them.

With respect to the claim, now for the first time set p, to the 240*l.*, it appears to me that the absence of all ıention of that claim in the particulars of demand, is ecisive.

COLTMAN, J.—I am of the same opinion. The third plea raverses a material allegation in the first count, viz. that ıe bankrupt before his bankruptcy, and his assignees ince, were ready and willing to fulfil the contract on their espective parts. It is contended on the part of the plainiffs that the plea could only be established by shewing a ender of the shares and a refusal to accept or to pay for hem. But I am not aware of any principle on which this an be held to stand differently from any other allegation. he circumstances of the case clearly warranted the jury ı infering that neither the bankrupt nor the plaintiffs ere ready to fulfil the contract.

As to the third plea.

The ninth plea, to the second count, alleges an agreeıent between the plaintiffs and the defendant to abandon he contract. From the facts proved I think the jury ıight well conclude that by mutual consent the contract as treated as being at an end. The plaintiffs undoubtedly ad the right to elect whether they would adopt the conract or not; but this election they were bound to make ithin a reasonable time. It appears they had not the ıeans of fulfilling it, the estate having produced scarcely ny assets. It would be extremely hard if assignees might tay their hands for so long a period, to take the chance of

As to the ninth plea.

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the market, and then call upon parties to perform contracts long since considered cancelled.

The demand upon the last count cannot upon the particulars arise.

ERSKINE, J.—With respect to the third and ninth pleas, I fully concur in the opinions already pronounced. The particulars of the plaintiffs' demand seem to have been confined to a claim for the supposed profits that might have accrued to the bankrupt from a performance of the contracts by the defendant.

Rule discharged.

Wednesday, April 24th.

In trover for a bill of exchange, the defendant pleaded, that, after the bill had been indorsed to the plaintiff, and whilst it was in her possession, she indorsed it in blank, that one R. was, by virtue of such last-mentioned indorsement, the holder, and was possessed of the bill, and that the defendant, believing that R. was lawfully possessed of the bill, and had authority to negotiate and dispose of it, received it from him as security for a pre-existing debt. The plaintiff replied, that, at the time of the defendant's so taking and receiving the bill from R., the defendant had notice and well knew that R. had not good or sufficient right or authority to lodge and deposit the bill with the defendant:—Held, that the issue was well taken.

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THIS was an action of trover for a bill of exchange, bearing date the 20th December, 1837, drawn by one William Powell upon and accepted by one William Hilton, payable to the order of Powell three months after the date thereof, and by Powell indorsed to the plaintiff.

The defendant pleaded—first, not guilty—secondly, that the plaintiff was not possessed of the bill of exchange as of his own property—thirdly, that, before *and at the time of* the supposed conversion of the bill of exchange in the declaration mentioned, the plaintiff, being possessed of the said bill of exchange, before it became due and payable, indorsed the same to the defendant for a good and valuable consideration in that behalf; by means whereof the defendant then became and was the lawful holder of the said bill of exchange, and continued such holder until and at the time of the supposed conversion thereof—verification.

Fourth plea—that, after the drawing and accepting the

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bill of exchange in the declaration mentioned, and after the bill had been indorsed by Powell to the plaintiff, and before the bill became due and payable, and whilst it was in the possession of the plaintiff, she indorsed the same in blank; that, before and at the time of the said supposed conversion by the defendant, one Rawlings was, by virtue of such last-mentioned indorsement, the holder, and was possessed of the said bill with such indorsement by the plaintiff in blank as aforesaid; that, afterwards, and before the bill became due and payable, to wit, on the 16th January, 1838, Rawlings, then being the holder and in possession of the bill, offered to deposit and leave the same in the hands of the defendant as a security for the payment of a certain sum of money, to wit, 35*l.*, then due and owing by Rawlings to the defendant; that the defendant, being satisfied as to the credit and respectability of the drawer and acceptor thereof, and of the plaintiff, and also then believing, and still believing, that Rawlins was lawfully possessed of the bill, and had good and sufficient right and authority to negotiate and otherwise dispose of the bill, and to lodge and deposit the bill with the defendant, and to deliver the same to him, and not then knowing nor yet knowing the contrary thereof, afterwards, and before the bill became due and payable, took and received of and from Rawlings the said bill as a pledge and deposit to be by the defendant kept and retained until the said 35*l.* were repaid and satisfied, and to secure the repayment thereof: by means of which said several premises the defendant then became and was the lawful holder of the said bill of exchange, and continued such holder thereof until and at the time of the supposed conversion thereof in the declaration mentioned; that the said 35*l.* had not at any time before the commencement of this suit been repaid to the defendant, but still remained and was wholly due and unpaid to him—verification.

Demurrer to the third plea.

The plaintiff demurred specially to the third plea, on the

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ground of repugnancy, and that it contained allegations at variance and inconsistent with each other: and replied to the fourth, that, at the time of the defendant's so taking and receiving from Rawlings the bill of exchange as in that plea mentioned, *the defendant had notice and then well knew that Rawlings had not good or sufficient right or authority to lodge and deposit the bill* with the defendant as such pledge and deposit, to be by him kept and retained until the said 35*l.* were repaid and satisfied, and to secure the repayment thereof—concluding to the county.

Replication to the fourth plea.

Joinder. Demurrer to the replication to the fourth plea.

The defendant joined in demurrer to the third plea, and demurred to the replication to the fourth plea, on the ground that the issue tendered by the replication was immaterial, there being no averment that Rawlings had not good title to the bill, and power to dispose thereof. Joinder.

Stephen, Serjeant, in support of the demurrer to the third plea.—The plea is inconsistent and repugnant; it alleges that two different persons were, at the time of the conversion, holders of the bill. [The Court called on—

Hoggins to support the plea.—He submitted that the words "at the time of," being repugnant, might be rejected as surplusage, and the plea would be good without them; and that the whole plea amounted to no more than an averment that the plaintiff indorsed the bill to the defendant.

The Court expressing a decided opinion that the third plea was bad, *Hoggins* proceeded to support the demurrer to the replication to the fourth plea.

He submitted that the material part of the plea was, not the knowledge or belief of the defendant, but the *fact* of Rawlings's authority, and therefore that the traverse was clearly improper, taking issue upon that which was mere surplusage in the plea.

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Stephen, Serjeant, in support of his replication.—The plea avers that the defendant believed that Rawlings was lawfully possessed of the bill, and had good and sufficient right and authority to negotiate and otherwise dispose of the bill. In what other form than that here adopted could the plaintiff have taken issue upon that allegation? Either the replication is a good answer to the plea, or the plea itself is bad in substance. It does not aver that Rawlings was the *lawful* holder of the bill: it is perfectly consistent with what is alleged, that Rawlings might have acquired the bill in an improper manner—that he might have found it or stolen it; in which case the fact of its being handed over in satisfaction or as a security for an antecedent debt would confer no title as against the plaintiff—*De La Chaumette* v. *The Bank of England*, 9 B. & C. 208. In *Jones* v. *Winckworth*, Hardres, 111, in trover for letters patent, after verdict for the plaintiff, it was moved in arrest of judgment that the plaintiff had not alleged that he was possessed of the letters patent ut de bonis propriis: "Sed non allocatur: and the declaration does mention that the defendant, knowing them to appertain to the plaintiff, converted them; which implies as much." A bank bill payable to A. or bearer, being given to A., and lost, was found by a stranger, who transferred it to C. for a valuable consideration, C. got a new bill in his own name. Et per Holt, C. J.—"A. may have trover against the stranger who found the bill, for, he had no title"—*Anonymous*, 1 Salk. 126. In Comyns's Digest, *Action upon the Case upon Trover*, (B), it is said, upon the authority of *Lucas* v. *Haynes*, 1 Salk. 130, that, "if a bill of exchange payable to A. *or order*, be indorsed with the name of A., but no assignment written, and afterwards found by B., trover lies against him by A., for, by the writing of his name, the property of the bill was not transferred." Even had the bill been deposited for a present advance of money or goods, the plea should have averred that the defendant had no knowledge

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of any defect in the title of Rawlings—*Collins* v. *Martin*, 1 B. & P. 648; *Treuttel* v. *Barandon*, 8 Taunt. 100; *Evans* v. *Kymer*, 1 B. & Ad. 528; *Haynes* v. *Foster*, 2 C. & M. 237, 4 Tyr. 65; *Fancourt* v. *Bull*, 1 Scott, 645, 1 New Cases, 681.

Higgins, in reply.—The fourth plea states that the plaintiff indorsed the bill in blank, which primâ facie imports consideration. *Fancourt* v. *Bull* is a distinct authority in favour of the defendant.

TINDAL, C. J.—I am of opinion that the plaintiff is entitled to judgment on the demurrer to the replication to the fourth plea. I have very great doubt whether the plea is good in substance; for, it discloses no authority in Rawlings, through whom the defendant derives title, to dispose of the bill, and shews no new consideration for the delivery of it to the defendant. It is not necessary, however, to give any opinion upon that point; for, the replication tenders an issue that is material between the parties. The fourth plea states in substance that the plaintiff indorsed the bill in blank, and that Rawlings was, by virtue of such indorsement, the holder—not expressly averring that he was the *lawful* holder. Now, if this be taken as a sufficient allegation that Rawlings was the lawful holder of the bill, that shews a good title in the defendant; for, then Rawlings had authority to pledge the bill. Then there comes another answer, viz. that the defendant, believing that Rawlings was lawfully possessed of the bill, and had authority to dispose of it, and not knowing to the contrary, took and received the bill from Rawlings as a pledge and deposit to secure the repayment of the 35*l*. Taking it that Rawlings had lawful title, then the plea would be double, inasmuch as it is left uncertain whether the defendant relies on the title of Rawlings, or on the primâ facie title in himself arising from the absence of notice of the feebleness of

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Rawlings's title. To make the plea a good one, we can only take the first allegation as an allegation of a primâ facie title in Rawlings as holding by indorsement; and that the defendant took the bill from Rawlings without notice of Rawlings's defective title. The real question that is raised by the plea, is, whether or not the defendant, at the time he received the bill, had notice or knowledge of Rawlings's defective title. Construing the plea therefore most beneficially for the defendant, we are bound to hold that the replication has taken issue upon that which the defendant has made the material part of his plea.

BOSANQUET, J.—I am of the same opinion. The fourth plea is a plea in confession and avoidance. It does not profess to be either a denial of the plaintiff's title or of the conversion: but, admitting both the plaintiff's title and the fact of the conversion, it alleges as matter of excuse, that, Rawlings being the holder of the bill, whatever his title, it came to the defendant without notice that such title was defective. That excuse is traversed by the replication; and it seems to me that that traverse is properly taken.

COLTMAN, J.—I am of the same opinion. The material allegation in the fourth plea is, not that Rawlings had title to the bill, for it is neither averred that it was indorsed to him, or that he was the *lawful* holder; but that, Rawlings being possessed of the bill, the defendant, believing that he had good title, and having no notice or knowledge to the contrary, took it by way of pledge or security for an antecedent debt. Without stopping to inquire what would be the effect of the bill being taken in satisfaction of a by-gone debt, it appears to me that the replication traverses the only material allegation in the plea, unless we put such a construction upon it as will make it obnoxious to the charge of duplicity.

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ERSKINE, J.—The fourth plea does not sufficiently allege any title in Rawlings to the bill; and therefore the defence could only rest upon the allegation upon which the traverse has been taken, viz. the defendant's ignorance of the defectiveness of Rawlings's title.

Judgment for the plaintiff.

Thursday, April 25th.

MANIFOLD and Another *v.* MORRIS, Assignee of HENRY RIGMAIDEN, a Bankrupt.

One R., possessed of a licensed house, mortgaged the premises, together with the license. After the license had been suspended for irregular conduct on the part of R., the mortgagee sold the premises, under a power of sale contained in the deed. The defendant, the assignee of R., who had in the meantime become bankrupt, obtained a new license in the name of the purchaser, for which the latter paid him 150*l.*: Held, that this was not money had and received to the use of the plaintiffs.

ASSUMPSIT for money had and received. Plea, non assumpsit.

At the trial before Coleridge, J., at the Spring Assizes at Liverpool, in 1838, the facts that appeared in evidence were as follow:—

On the 24th February, 1835, Henry Rigmaiden mortgaged to the plaintiffs for 3,900*l.* certain premises at Liverpool in which he had carried on business as a publican under the usual licenses, together with the licenses &c., with a power of sale on default in payment of principal and interest. On the 26th of the same month he executed a further mortgage upon the premises for 1,350*l.* to one Holder, with a like power of sale. And on the 27th he obtained on mortgage a further sum of 1,330*l.* from his brother, James Rigmaiden. On the 26th February, 1836, Henry Rigmaiden became bankrupt: and the defendant was afterwards appointed his assignee. On the 7th April following, the plaintiffs put up the premises to sale by auction, with an express reservation of the licenses (96). At this sale Edward Rigmaiden became the purchaser at

Quære, whether public-house licenses can properly be the subject of separate sale?

(96) This reservation, it was suggested, was occasioned by an apprehension the parties entertained, that, if they dealt in any manner with the licenses, they would render themselves liable to the Excise for penalties which had been incurred by Henry Rigmaiden.

the sum of 5,520*l.* The conveyance executed by the plaintiffs on this occasion made no mention of the licenses. The defendant on the same day agreed with Edward Rigmaiden to sell him the licenses for 150*l.* It appeared that the beer license had been in September, 1835, and still remained, suspended by the magistrates for some irregularity on the part of Henry Rigmaiden; and that, after he became the purchaser, a new license was obtained in the name of Edward Rigmaiden.

The learned judge was of opinion that the licenses could not be the subject of a sale, and that, as new licenses had been obtained for Edward Rigmaiden in his own name, there was an end of the question. He therefore directed a nonsuit.

Cresswell, in Easter Term last, obtained a rule nisi to set aside the nonsuit, and for a new trial.—He submitted that the licenses formed part of the mortgage security; and that, consequently, the defendant, having sold them, and received the price, was liable to refund the amount as money had and received by him to the use of the plaintiffs.

Alexander and *Crompton*, now shewed cause.—The plaintiffs were properly nonsuited. A tavern or public-house license is a mere personal privilege, and cannot be the subject of a bargain—9 Geo. 4, c. 61, ss. 1, 4, 9, 11, 14; *Ex parte Reid*, 1 Deac. & Ch. 250: and, if it were otherwise, the license in question was not in existence; it had been forfeited or suspended long before the time of the supposed sale.

The Court called on—

W. H. Watson (in the absence of *Cresswell*), to support the rule.—The mortgage embraced the licenses as well as the premises in which the business was carried on. The mortgagee was entitled not only to the premises, but to every right and privilege incident thereto. The new tenant

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could not obtain a new license without first obtaining a transfer of the old one.

TINDAL, C. J.—It appears to me that the sum which the plaintiffs seek to recover in this action is not money had and received by the defendant to the use of the plaintiffs. The facts are these:—The plaintiffs were mortgagees of a licensed house. In September, 1835, the license was forfeited or suspended in consequence of some misconduct on the part of the occupier, Henry Rigmaiden, the mortgagor: and in April, 1836, the plaintiffs sold the premises to a third person. From the moment of the sale, they ceased to be interested in the premises either as landlords or as tenants. It is said they retained an interest in the old license: but they do nothing. A new license is afterwards obtained by or in the name of the new occupier of the house. How can money received upon the sale of that which the plaintiffs were at no pains to obtain become money had and received to their use? It is matter of doubt with me whether these licenses can be made the subject of a sale. At all events, the present claim fails upon two grounds—first, it does not appear that the license which was the subject of the sale by the defendant was the license which had been assigned to the plaintiffs—secondly, all their interest in the premises ceased from the moment the mortgage was paid off, and the premises re-conveyed by them; and therefore they could not apply for a license. For these reasons, I am of opinion that the rule for setting aside the nonsuit must be discharged.

BOSANQUET, J.—This action for money had and received is founded on the supposition that the defendant has sold the property of the plaintiffs, and received the price of it. But it does not appear to me that the sale by the defendant to Edward Rigmaiden, and obtaining the grant of a fresh license to the latter upon payment of money to the Excise, can be considered as a sale of the plaintiff's property. The

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license claimed by the plaintiffs had been forfeited, or at least suspended, for misconduct. The tenant under the license had ceased to occupy the public-house; and no application to the magistrates for the renewal of the license had been made by the plaintiffs: nor, if any such application had been made, had they a right to insist upon its being granted. I am, therefore, of opinion that the nonsuit was right.

COLTMAN, J.—Under the 14th section of the 9 Geo. 4, c. 61, the assignees of a bankrupt are impowered to go before the magistrates and obtain a license to enable them to continue the business for the benefit of the estate: but such license could be of no value to them unless they were in the occupation of the premises. It might be worth Edward Rigwarden's while to give the defendant a price for any supposed interest he might have in the license. But I see no pretence for the plaintiffs coming to claim that as money had and received to their use.

ERSKINE, J., concurred.

Rule discharged.

RENDALL *v.* HAYWARD.

Wednesday, May 1st.

The court refused to grant a new trial in an action of slander, the jury having given the plaintiff 20*s.* damages only, though the judge who tried the cause was dissatisfied with the verdict.

THIS was an action on the case for slander imputing felony to the plaintiff.

At the trial before Vaughan, J., at the Sittings at Westminster in the present term, notwithstanding the words were proved to have been spoken under circumstances of a very aggravated nature, the jury returned a verdict for 20*s.* only.

Clarkson, on the part of the plaintiff, moved for a new trial, on the ground that the verdict was perverse, and disproportioned to the injury proved to have been sustained. He urged the hardship of permitting the plaintiff

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to be thus deprived of the costs, this being a case in which the judge had no power to certify to enable him to obtain them.

TINDAL, C. J.—The learned judge who tried the cause certainly thought that justice would have been more evenly administered between the parties had the damages been larger. But, it appears to me that it would be interfering too much with the province of the jury to send the cause down to a new trial on that account. We are not in the habit of interfering where the verdict is under 20*l.*, except where the judge has mistaken the law, or the jury have evidently made an erroneous calculation.

BOSANQUET, J.—The courts never grant new trials on the ground of the damages being excessive, unless the excess is very extravagant. I never heard of a new trial being granted merely because the jury have returned a verdict for 20*s.* where they ought to have given 40*s.* The general rule must be adhered to.

Rule refused (97).

(97) In Hayward v. Newton, 2 Str. 940, an action was brought for these words spoken of the plaintiff, a wine merchant—"You are a rogue, villain, and rascal, and sell by short measure"—and the jury gave 20*s.* damages. And, though it was thought a hard case, yet the court said it has always been denied to set aside a verdict for smallness of damages, and therefore denied it in this case.

Wednesday, May 1st.

A bill of exchange by which the drawees required the drawers to pay "two hundred pounds, value received," purported by the figures at the top to be a bill of 245*l.*, to which latter sum the stamp was applicable:—Held, that parol evidence was not admissible to shew that the bill was intended to be drawn for the larger amount, but that it must be taken to be an acceptance for 200*l.* only.

SANDERSON and Others *v.* PIPER and Others.

THE plaintiffs, as indorsees, declared against the defendants as acceptors of a bill of exchange for 245*l.*, for value received, bearing date the 30th August, 1836, and payable six months after date: with a count upon an account stated.

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The defendants pleaded to the first count, that they did not accept the bill; and to the second, that they did not promise as in that count alleged.

At the trial the plaintiffs produced in support of the declaration a bill of exchange of which the following is a copy:—

"£245 0 0 "London, Aug. 30, 1836.

"Six months after date, pay to our order two hundred pounds, for value received.

"To Messrs. H H. Piper & Co. "P. P. Maltby, Son, & Co.

"42, East Cheap. "Henry Maltby."

Accepted, payable at Hankeys' Henry H. Piper & Co.

Indorsed—"Thomas Maltby, Son, & Co."

The jury found a verdict for the plaintiffs for 245*l.* and interest, subject to the opinion of the court upon the following case:—

The plaintiffs are extensive bill-brokers in London. It was proved upon the trial, that the bill was drawn by Maltby & Co. upon and accepted by the defendants in payment of the sum of 245*l.*, being the contract price of ten tons of lead sold by Maltby & Co. to the defendants. The bill was drawn in figures for 245*l.*, but the words "and forty-five" were omitted from the body of the bill by mistake. The bill when drawn was upon a 6*s.* stamp; and the defendants, when they accepted it, intended to accept a bill for 245*l.*

It was further proved that the bill was left with the defendants for two or three weeks for their acceptance; and that application was made to them three several times for the bill as a bill for 245*l.*; the usual mode of applying for bills left for acceptance being by the amount as expressed in figures on the bill; and that it was referred to on those occasions by the drawers and the defendants as a bill for 245*l.*

It was also proved that the usual course of business among extensive bill-brokers in the city of London, is, to

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examine the bills discounted by them by the figures and the stamp, not by reading the body of the bill; as it would be almost impossible, from the number of bills discounted daily, to take them by anything but the figures and stamp.

On the 14th January, 1837, the plaintiffs discounted the bill for Maltby & Co., and the plaintiffs paid them 245*l.*, less the discount for the same. Before the bill arrived at maturity Maltby & Co. failed.

The defendants, upon the trial, objected to the admissibility of the evidence of the facts relating to the transaction in respect of which the bill was drawn, of the intention of the parties, of the circumstances relating to the applications for the acceptance, and of the defendant's conduct in regard to them. But the evidence was received, subject to the opinion of the court upon the admissibility of the whole or any part of the same.

The question for the opinion of the court was—whether, upon such of the evidence given at the trial as might be deemed to be admissible, the plaintiffs were entitled to recover in this action, either the sum of 245*l.* and interest, or the sum of 200*l.* and interest. If the court should be of opinion that the plaintiffs were entitled to recover either of those sums, a verdict was to be entered accordingly. If the court should be of opinion that the plaintiffs were not entitled to recover any sum from the defendants, a nonsuit was to be entered.

Wilde, Serjeant, for the plaintiffs.—The bill in question bearing a stamp applicable to a sum exceeding 200*l.*, and having been given in discharge of a written contract denoting date and amount, parol evidence was admissible for the purpose of shewing that it was the intention of Maltby & Co. to draw and of the defendants to accept a bill for 245*l.* Had there been no sum mentioned in the body of the bill, the figures at the top clearly would have regulated the amount. In *Rex* v. *Elliot*, 2 East's P. C. 951, 1 Leach,

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C. C. 175, 179, where the prisoner was indicted for forging a 50*l.* bank note, the word "pounds" was omitted in the body, but the letter £ and the word "fifty" were placed in the usual manner at the corner; it was held that the prisoner was properly convicted. In Marius, on Bills of Exchange, 3rd edit., p. 33, it is said: "If it so fall out, that, through unadvisedness, or error of the pen, the figures of the sum and the words at length of the sum that is to be paid upon any bill of exchange do not agree together, either that the figures do mention more and the words less, or that the figures do specify less and the words at length more, in either, or in any such like case, you ought to observe and follow the order of the words mentioned at length, and not in figures, *until further order be had concerning the same*, because a man is more apt to commit an error with his pen in writing a figure, than he is in writing a word: and also because the figures at the top of the bill do only, as it were, serve as the contents of the bill, and a breviat thereof, but the words at length are in the body of the bill of exchange, and are the chief and principal substance thereof, whereunto special regard ought to be had." The rule is similarly laid down in Beawes's Lex Mercatoria, 149, pl. 143; and the passage is also to be found in Forbes on Bills of Exchange, as well as in the more modern treatises on the subject. The effect of these authorities is that the drawee is to treat the sum stated *in words* as the proper amount of the bill, *unless otherwise advised.* Now, here, the defendants were otherwise advised; for, they knew upon account of what particular contract the bill was drawn. Every contract is to be taken in the strongest sense the construction will admit of against the party making it. The stamp is applicable to a larger amount than 200*l.*: at the time Marius wrote, bills of exchange were not stamped. Undoubtedly, parol evidence is not in general admissible to explain a patent ambiguity: but, where a bill is drawn, as here, in pursuance and in satisfaction of a written con-

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tract, there can be no difficulty in holding that evidence might properly be given to shew what that contract was, and what was the intention and the understanding of the parties. Where a bill appears upon the face of it to have been altered, evidence is constantly admitted for the purpose of shewing when the alteration was made—*Henman* v. *Dickenson*, 2 M. & P. 289, 5 Bing. 183; *Knight* v. *Clements*, 3 N. & P. 375. So, parol evidence was admitted to a material extent in *Gibson* v. *Minet*, 1 H. Blac. 569, where it was held, that, if a bill of exchange be drawn in favour of a fictitious payee with the knowledge as well of the acceptor as the drawer, and the name of such payee be indorsed on it by the drawer with the knowledge of the acceptor, which fictitious indorsement purports to be to the drawer himself or his order, and then the drawer indorses the bill to an innocent indorsee for a valuable consideration, and afterwards the bill is accepted, but it does not appear that there was an intent to defraud any particular person; such innocent indorsee for a valuable consideration may recover against the acceptor as on a bill payable to bearer. Suppose a commercial instrument subject to an infirmity similar to this, can it be doubted that evidence would be admissible to shew how the parties had dealt with it? [*Bosanquet*, J.—The difficulty is, that the ambiguity is patent on the face of the instrument.] The doctrine as to patent ambiguities does not apply in all its strictness to mercantile contracts. There are numerous cases where evidence has been received for the purpose of explaining contracts. Thus, in *Fonnereaux* v. *Poyntz*, 1 Brown, C. C. 472, evidence of the state of a testatrix's property was let in, to shew, that, by a gift of a sum in Long Annuities, she meant a gross sum, not an equivalent annuity (98). So, in *Beaumont* v. *Fell*, 2 P. Wms. 141, evidence was admitted to shew that a testator meant to give

(98) But see Chambers v. Minchin, 4 Ves. 675.

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a bequest to a different person from the one named In *Smith* v. *Wilson*, 3 B. & Ad. 728, in a lease of a rabbit warren, the lessee covenanted, that, at the expiration of the term, he would leave on the manor 10,000 rabbits, the lessor paying for them 60*l.* per *thousand:* and it was held, in an action by the lessee against the lessor for refusing to pay for the rabbits left at the end of the term, that parol evidence was admissible to shew, that, by the custom of the country where the lease was made, the word *thousand*, as applied to rabbits, denoted *twelve hundred*. *Bottomley* v. *Forbes*, 6 Scott, 866, 5 New Cases, 121, where most of the authorities on the subject are collected, is also in point. There, by a charterparty made in London the defendant engaged to ship on board the plaintiff's vessel at Bombay a full cargo at a certain price per ton—cotton to be calculated at fifty cubic feet per ton, and other goods according to the scale of tonnage of the East India Company. In an action of assumpsit for the freight, it was held that it was competent to the defendant to give evidence of a custom at Bombay to calculate the freight upon a measurement of the bales of cotton immediately after they had been submitted to hydraulic or other pressure, so as to reduce them to the smallest practicable bulk. Had the defendants here been sued for the contract price of the lead, it clearly would be competent to them to shew that this bill had been given and received in satisfaction.

Peacock, for the defendants.—The ambiguity being patent, evidence was not admissible to explain it. In *Rex* v. *Elliot*, there was no variance between the body of the note and the sum mentioned at the foot of it: the £ was called in to assist and explain, not to contradict the material part of the instrument; just as the venue in the margin of a declaration has been admitted for the purpose of aiding a want of venue in the body. Neither can the court look at the stamp: the stamp is never looked at for the purpose

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of ascertaining whether an instrument between landlord and tenant is an agreement merely or a lease. The passages cited from Marius and Beawes clearly shew, that, where there is a discrepancy between the words and the figures in a bill, the former are to prevail. The figures in fact are inserted merely for convenience of reference. Besides, until the passing of the statute of 1 & 2 Geo. 4, c. 78, acceptances might be by parol: now they must be in writing. *Fonnereau* v. *Poyntz*, *Beaumont* v. *Fell*, and most of the other cases cited on the part of the plaintiffs, were cases of latent ambiguities, which do not appear until the parol evidence is offered. Though evidence may in some cases be received for the purpose of shewing how the parties have dealt with a contract, it is only for the purpose of explaining, and not for the purpose of varying or contradicting it where it is intelligible on the face of it.

Wilde, Serjeant, in reply.—Marius and Beawes are authorities to this extent—that, where the figures and the words disagree, the bill may be a good bill for the sum specified in figures, and that it is not to be controlled and made contrary to the intention of the parties, by the amount stated in the body of it. The evidence was offered, not to contradict, but merely to shew to what the words "value received" had reference. That evidence may be given to shew a mistake in a mercantile contract, is not disputed. The stamp, being regulated by the amount for which the bill is drawn, is a circumstance that ought to have some weight. In the case of a lease or agreement, the stamp is no criterion; it may be and frequently is put upon the instrument after its execution.

TINDAL, C.J.—The only question in this case is, whether, by the rules of law, the evidence given upon the trial of this cause was admissible or not. It seems to me, that, under the circumstances, it was not. This is a clear case

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Ambiguitas patens not explainable by parol evidence.

of ambiguitas patens: and the rule is well established, that, where, by an ambiguity patent on the face of the instrument, the intention of the parties is left in doubt, parol evidence is not admissible to explain it. The bill purports in the body of it to be drawn for 200*l.*; the defendants are required to pay that sum; and consequently it is an acceptance for 200*l.* In the corner of the paper 245*l.* appears in figures. If this creates any ambiguity, it is apparent on the face of the instrument. All the cases relied on for the plaintiffs, when looked at carefully, will be found to be cases where the ambiguity was introduced by the evidence. From what appeared upon the face of the bill in *Gibson* v. *Minet*, nobody could have doubted but that the payee was an existing person: the fact of the name being fictitious appeared only by the parol evidence. So, in the case of commercial contracts, the difficulty always arises from the use of words of art, to which the custom or the usage of the particular trade has assigned some technical meaning. In *Rex* v. *Elliot*, the judges felt themselves at liberty to look at the sum specified at the foot of the note, with a view to ascertain the intention of the prisoner; they did not use it for the purpose of shewing the note to be valid for any commercial purpose—which would have been the very question now before us. It seems to me, that, bereft as we are of the authority of any writers of our own country upon the subject, we cannot adopt a safer rule than that laid down by Marius and by Beawes, viz. to give force to the words at length, in preference to the figures, for the very satisfactory reason assigned by the former—"because a man is more apt to commit an error with his pen in writing a figure, than he is in writing a word: and also because the figures at the top of the bill do only, as it were, serve as the contents of the bill, and a breviat thereof, but the words at length are in the body of the bill of exchange, and are the chief and principal substance thereof, whereunto special regard ought to be had." Adopting this rule,

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it appears to me that this must be held to be a good bill for 200*l.*, and that the plaintiffs are entitled to judgment for that sum.

BOSANQUET, J.—I am of the same opinion. The question is whether this is a bill for 200*l.* or for 245*l.*, or whether it is void altogether for uncertainty. As the plaintiff could only declare upon this bill in one count, this is just a case for an amendment under the statute 3 & 4 Will. 4, c. 42, s. 23; and therefore, if the plaintiffs are entitled to recover 200*l.*, the count should be amended, and the verdict entered for that sum accordingly (99). It seems to me that there was abundant evidence to shew that the bill was intended by the parties to represent 245*l.*: but, the doubt arising on the face of the instrument itself, that evidence was not admissible; our rules of law not permitting evidence to be offered to explain an ambiguity that is patent upon the face of the instrument. The foreign writers that have been referred to lay it down as a rule for the construction of bills of exchange, that, if there is a variance between the sum denoted by the figures and that expressed in words in the body of the bill, the latter is to determine the meaning of the parties. That rule seems to me to be expressly applicable, and ought to prevail here. The argument that has impressed me the most forcibly, is, that arising from the rule of our law, that all contracts are to be construed most strongly against the party to be bound by them. But I am not aware of any case, and none has been cited, where an ambiguity of this description has been allowed to be explained by parol evidence. Whatever may be the case as to other instruments, I am disposed to adopt

Serjeants' practice as to amendments under the statute.

(99) Upon an objection being made that an amendment was not asked for at the trial, *Wilde*, Serjeant, stated that a general understanding prevailed, and was uniformly acted upon by the Serjeants in this court, that, whenever it became necessary that an amendment should be made, the fact of its not having been mentioned at the trial, should not preclude the court from permitting it to be made.

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the rule laid down by Marius for the construction of bills of exchange.

COLTMAN, J.—This is clearly a case of patent ambiguity; and, unless we disregard a well established rule, we cannot hold the evidence offered to explain it to be admissible. But I am rather disposed to think, that, where a party issues a bill bearing an undertaking on the face of it for the payment of two different sums, it ought to be taken most strongly against him who so puts it in circulation. In *Edis* v. *Bury*, 9 D. & R. 492, 6 B. & C. 433, this was the principle that was acted upon. It was there held, that, if a negotiable instrument for the payment of money is framed in such equivocal terms as to render it doubtful whether it be a bill of exchange or a promissory note, the holder has, as against the maker, the option of treating it as either. The figures here were calculated to delude any holder into a belief that 245*l.* was the real sum for which the bill was accepted. If this had been done with a fraudulent intent, I apprehend no doubt could be entertained as to the holder being entitled to recover the larger amount; and it seems to me that notwithstanding the absence of fraud the legal effect is the same. I think the bill ought to be considered to be a bill for 245*l.* Coltman, J., *dis.*

ERSKINE, J.—I am of opinion that this bill is a bill for 200*l.* only. I take it there is no doubt according to our law, that, if a security be upon the face of it so ambiguous that the court cannot by any known rule of construction ascertain it to be one thing in preference to another, the instrument is void altogether. The rule is equally clear, that evidence is not admissible to explain an ambiguity patent upon the face of the instrument. Evidence is only admissible where the evidence itself creates the ambiguity: as, where an estate is devised to one of the sons of J. S., evidence cannot be received to shew which son is intended: but, where the devise is, to the eldest son of J. S., and it

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appears that there are two persons of that name, evidence may be given to shew which was the person intended to take; for, there is no ambiguity on the face of the will itself; it arises from matter dehors the will. So, here, there is no ambiguity on the face of the bill: the figures clearly import 245*l.*, and the words 200*l.* How, then, is the doubt to be solved? If the figures and the words were to be considered of equal import, I should have been inclined to agree with my Brother Coltman, that that construction should be put upon it which would bear most strongly against the party whose bill it is. But, according to the authority of Marius and Beawes, the figures in a bill are to be esteemed of less importance than the words written at length in the body of it: and therefore we must look exclusively to the latter, unless, as in *Rex* v. *Elliot*, the omission in the body is consistent with the breviat in the margin, so that the one may fairly be taken as an index to the other. For these reasons, I am of opinion that we must look to the body of the bill to ascertain the intention, and that consequently we must take this to be a bill for 200*l.* only.

Verdict for the plaintiffs for 200*l.*

The defendants claimed the costs of the argument, on the ground that the declaration was not so framed as to entitle the plaintiffs to recover as upon a bill for 200*l.*, and that this was not a case for amendment under the 3 & 4 Will. 4, c. 42, s. 23. But the court refused to allow them, and held that it *was* a case for amendment at the trial, upon nominal costs.

Talfourd, Serjeant, on a subsequent day, moved for a rule calling on the plaintiffs to shew cause why a nonsuit should not be entered, or why the costs of the defendants should not be deducted from the amount of the verdict. The affidavit upon which the motion was founded set forth several communications between the respective attornies of the parties upon the subject of the bill, amongst others a letter of the 15th September, 1838, from the defendants' attornies to the plaintiffs' attornies, stating that the defendants would resist the plaintiffs' demand for 245*l.*, and asking them to admit that a tender of 200*l.* had been made, to

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which the plaintiffs' attornies sent an answer on the 17th, inclosing a copy of the writ of summons, conveying their refusal to make the required admission. He submitted, that, inasmuch as the defendants had succeeded upon the only real question between the parties, they should at least be saved harmless from the costs.

Wilde, Serjeant, and *R. V. Richards*, in Trinity Term, shewed cause.—This is an application of a novel description: it is a mere pretext for re-agitating the question already decided by the court upon the special case. The plaintiffs' difficulty arose from the new rules, which precluded them from declaring on the bill in more than one count. The contract upon the face of it was ambiguous: to call it a bill for 200*l.*, would have been a misdescription; and it would have been equally so to call it a bill for 245*l.*: it was therefore a clear case for amendment at Nisi Prius. The defendants might have paid 200*l.* into court; but, inasmuch as by so doing they would have admitted the contract to be valid to that extent, and one of their arguments was that the bill was wholly void for uncertainty, they did not adopt that course. In *Hume* v. *Peploe*, 8 East, 168 (100), Lord Ellenborough points at the course of proceeding that the defendants should have adopted here—an application for leave to pay the principal and interest into court; after which the plaintiffs would have proceeded at the peril of having to pay the costs if they failed to recover more.

Talfourd, Serjeant, in support of his rule.—The court had no power to give judgment for the plaintiffs on this record for 200*l.*, without the intervening process of amending the declaration: and this is not a case where the plaintiffs could have asked for an amendment at the trial; for, under the peculiar circumstances, an amendment would

(100) And see Poole v. Tumbridge, 2 M. & Welsby, 223.

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not have availed them. If such an application had been made, the letter of the defendants' attornies of the 15th September, 1838, and the answer to it of the 17th, would have disclosed the relative situation of the parties, and the defendants would at least have had their costs.

TINDAL, C. J.—It appears to me that this question must be determined by reference to the form of the special case, and of the questions at the end of it, which embody the intention of the parties. The case states that the plaintiffs, as indorsees, declared against the defendants as acceptors of a bill of exchange for 245*l.*; and, after setting forth the circumstances, states the question for the opinion of the court to be—whether, upon such of the evidence given at the trial as might be deemed to be admissible, the plaintiffs were entitled to recover in this action either the sum of 245*l.* and interest, or the sum of 200*l.* and interest: and then proceeds to say, that, if the court should be of opinion that the plaintiffs were entitled to recover either of these sums, a verdict was to be entered accordingly; and, if the court should be of opinion that the plaintiffs were not entitled to recover any sum from the defendants, a nonsuit was to be entered. It seems to me, therefore, that, if in the judgment of the court a verdict ought to be entered for the plaintiffs for either of the sums mentioned, as a necessary consequence the costs must follow. We thought the bill good for the smaller sum, and directed the verdict to be entered accordingly. The defendants now recur to the declaration, and contend that it will not authorize a judgment for the 200*l.*; and it is said that this is not a case for amendment. But it appears to me that it is of all others a case in which an amendment ought to be allowed; and, as the amendment would not in the smallest degree vary the line of defence, it would be granted on payment of mere nominal costs. The very form of the question shews that it was agreed between the parties that a nonsuit should not be entered unless the bill should be held to be wholly void.

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VAUGHAN, J.—I am of the same opinion. The difficulty has arisen from the new rules of pleading allowing one count only upon the bill; though, I must confess that I should in this particular case have thought that a second count might have been added. But, at all events, it is precisely a case for amendment. I seems to me that the defendants are concluded by the mode of shaping the question at the end of the special case.

COLTMAN, J.—I am of the same opinion. The course the defendants should have adopted is very obvious; they should have taken out a summons to stay the proceedings on payment of the 200*l.* and costs, and then, if the plaintiffs ultimately recovered no more, the defendants would have been exempted from all the subsequent costs. As they did not think proper to avail themselves of the opportunity of doing this, I do not see upon what principle they are entitled to call upon us to depart from the ordinary course. Even to the last moment, the defendants contested the right of the plaintiffs to recover the 200*l.*

ERSKINE, J.—The argument urged on the part of the defendants amounts to this, that the court have adopted an erroneous view in holding that the plaintiffs were entitled upon this declaration to recover 200*l.* If, on the argument of the special case, the defendants had intended to rely on the variance, that should have been more clearly stated; and then the plaintiffs would have inserted an express reservation that the court should possess the same power to amend as the judge at Nisi Prius would have had. Now, it is perfectly clear that the amendment would have been allowed at Nisi Prius, on payment of nominal costs only: the defendants would not have been at all prejudiced by it. That which they now complain of is in fact the consequence of their own want of decision; if they had taken out a summons to stay the proceedings on payment of the 200*l.*, with

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interest, and costs, they would not have had to pay the costs incurred subsequently. Not chusing to take that course, the defendants proceeded to trial, and to the argument of the special case. The question reserved by the special case, was, whether the bill was a valid security for 200*l.* or for 245*l.*, the verdict to be entered for the one sum or for the other as the court should think fit. The court having thought fit to direct a verdict to be entered for the plaintiffs for 200*l.*, I see no reason why they should be deprived of any advantage legitimately flowing therefrom.

Rule discharged.

Wednesday, May 1st.

STERT and Another, Executrix and Executor of JANE BURN, Deceased, *v.* PLATEL.

Testator devised an estate to A. H. for life, remainder to R. H. for life, and to his first and other sons successively in tail male, with remainder, in default of such issue to A. D. H. for life, with remainder to his first and other sons successively in tail male; and, in default of such issue, she gave and devised the same premises "unto such person bearing the surname of H., as *shall be* the male relation nearest in blood to the said R. H., and to his heirs for ever:"—Held, that the ultimate remainder in fee vested in interest *at the death of the testatrix.*

THIS was an action of assumpsit brought by the plaintiffs as executrix and executor of Jane Burn, deceased, to recover from the defendant the sum of 120*l.* alleged to have become due from him to her in her lifetime, for the use and occupation of two messuages, with the appurtenances, at Peterborough, in the county of Northampton. The defendant pleaded the general issue. A verdict was found for the plaintiffs, with 120*l.* damages, subject to the opinion of the court upon the following case:—

Eleanor Hake, being seised in fee of the messuages for the use and occupation of which this action was brought, on the 1st May, 1784, by her will, duly executed for passing real estates, devised the messuages to Abraham Hake for life, with remainder to trustees to preserve contingent remainders; with remainder to Richard Hake, son of Abraham Hake, for life; with remainder to trustees to preserve contingent remainders; with remainder to the first and other sons of the said Richard successively in tail

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male; with remainder, in default of such issue, to Abraham David Hake, another son of the said Abraham, for life; with remainder to trustees to preserve contingent remainders; with the remainder to the first and other sons of Abraham David Hake successively in tail male. The will proceeded as follows:—"And, in default of such issue, I give and devise the premises unto such person bearing the surname of Hake, as *shall be* the male relation nearest in blood to the said Richard Hake, and to his heirs for ever."

Death of the testatrix, and of Abraham Hake.

The testatrix, Eleanor Hake, died in the year 1784, without having revoked or altered her will; and Abraham Hake entered into the possession of the premises. He died so possessed of them in the year 1792, leaving the said Richard and Abraham David, his two sons, him surviving; and on his death the premises came into the possession of the said Richard, who died in the year 1813, without having had issue. Abraham David then entered into possession of the premises, and continued so in possession or in the receipt of the rents and profits thereof until his death.

Death of Richard Hake.

Defendant tenant of the premises.

Several years previous to the death of the said Abraham David, the defendant became his tenant of the premises, and continued to be such tenant up to and at the time of his Abraham David's, death, and paid him rent for the same as such tenant. After the death of Abraham David, the defendant continued to occupy the premises up to and at the time this action was brought, and the sum of 120*l.* was then due from him for the rent thereof. In the year 1826, Abraham David, so then being in possession, or in the receipt of the rents and profits of the premises, by his will, duly executed for passing real estates, devised the same to the said Jane Burn in fee. Abraham David Hake died on the 28th September, 1833, without having had issue, leaving the said Jane him surviving; and the defendant having refused to pay the rent which had accrued due from him for the occupation of the premises after the

Death of Abraham David Hake.

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death of the said Abraham David, to Jane Burn in her lifetime, or to the plaintiffs, executrix and executor, or to either of them, since her death, this action was brought.

Question.

The question for the opinion of the court, was, whether the premises passed to Jane Burn by the will of Abraham David Hake. If the court should be of opinion that the premises did so pass, then the verdict was to stand; but, if otherwise, then a nonsuit was to be entered.

N. R. Clarke, for the plaintiff.—The question is at what period the ultimate remainder in fee vested. If it vested at any time *prior* to the death of Abraham David Hake, it became vested in him, and passed by his will to the plaintiff: if it did not vest *until* the death of Abraham David Hake, the plaintiff is not entitled to recover in this action. There were only three periods at which the ultimate remainder in fee limited by the will of Eleanor Hake could vest—first, at the death of the testatrix—secondly, at the death of Richard Hake, to whose male relation nearest in blood the remainder was given—thirdly, at the death of Abraham David Hake.

As to the time when the remainder vested.

It vested at the first mentioned period, viz. the death of the testatrix: a remainder is never to be construed to be contingent, when it can be construed to be vested. In *Ives* v. *Legge*, 3 T. R. 488, n., Lord Hardwicke says: "As the court never construes a limitation into an executory devise, where it may take effect as a remainder, because the former puts the inheritance in abeyance; so neither does it construe a remainder to be contingent, where it can be taken for vested; because the latter tends to support the estate, and the former to destroy it, by putting it in the power of the particular tenant to defeat the remainder by a fine or feoffment." So, in *Doe* d. *Cholmondeley* v. *Maxey*, 12 East, 604, Bayley, J., says: "It is a settled rule not to read a limitation in a will as being a contingent remainder, unless such appears clearly to have

been the intention of the testator; but, if it will admit of being considered as a vested remainder, the court will always read it as such, because a contingent remainder is always liable to be defeated, and the intention of the testator thereby frustrated." In *Driver* v. *Frank* (101), 3 M. & S. 32, Dampier, J., says: "It has always been an object with courts of law and of equity to vest interests as soon as the words of the instrument will admit of it. Such a construction is convenient, as it facilitates provisions for families, by ascertaining the rights and property belonging to each member of it, and tends in general to an equal and fair arrangement and distribution." In *Doe* d. *Pilkington* v. *Spratt*, 5 B. & Ad. 731, 2 N. & M. 524, A. devised copyhold lands to his son D. S. and his wife, and J. H. and his wife, or the survivor of them, for their lives, and, after the decease of all of them, to the male heir-at-law of him the testator, his heirs and assigns for ever: he then bequeathed legacies to three other sons, and afterwards died, leaving five sons and one daughter, three by his first wife, and three by the second: it was held that the fee vested at the testator's death in the person who was then his male heir-at-law, and did not remain contingent until the determination of the life estates. Lord Denman, in delivering the judgment of the court, there says: "The law favours the vesting of estates, and it is an established rule of construction not to read a limitation in a will as being a contingent remainder, unless such clearly appears to have been the testator's intention—if it admits of being considered as a vested remainder, it will always be read as such." And see the learned and elaborate judgment of the Master of the Rolls (Sir Thomas Plumer), in *Cholmondeley* v. *Clinton*, 2 Jac. & W. 1. Then, is there upon the face of this will any thing to indicate an intention in the testatrix to postpone the vesting? The case does not find that there existed any person whom the testatrix could have had in her mind at the time. The words them-

As to the construction of the will.

(101) Affirmed on appeal, 6 Price, 41, 2 Moore, 519.

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selves—"such person as shall be the nearest in blood"—do not necessarily point at any period more remote than that of the death of the testatrix. In *Doe* d. *Garner* v. *Lawson*, 3 East, 278, the testator devised to his natural son, and, in case of his marriage with certain persons, or his dying without issue, then to his nephew for life, and after his decease then for and amongst such person and persons, his and their heirs &c., as should appear and can be proved to be his next of kin, in such proportions as they would by virtue of the statute of distributions have been entitled to his personal estate if he had died intestate: and it was held that the distribution was to be made amongst those who were the testator's next of kin *at the time of his death*, though the nephew, to whom a prior life estate was given, were one of them. Lord Ellenborough there said: "As to the words of description used being in the future; words to postpone the vesting in possession of an interest, are naturally prospective. It could not be clear to the testator himself who would take under the description at the time of his death, nor would it so appear to the trustees till after Wilson's (the testator's) death, and inquiry made. This I think is the plain and natural meaning of the words. But this construction is also supported by the case of *Rayner* v. *Mowbray*, 3 Bro. C. C. 234. There the distribution was not to take effect till after the death of the wife, but yet it was referred to such persons as would have been entitled to share at the death of the testator under the statute of distributions." So, here, it could not be clear to the testatrix who would be the nearest in blood at the time of her death; and therefore the words may as well apply to that time as to any other. In *Doe* d. *Cholmondeley* v. *Maxey*, 12 East, 589, the words were "to such person and persons, and for such estate and estates, as should *at that time* (that is, on the death of the last tenant for life named, without issue male) and from time to time afterwards be entitled to the rest of the testator's real estate by virtue of and under his

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will:" and it was held that the ultimate remainder in fee to the testator's own right heirs vested by descent in the person who was the testator's heir *at the time of his death*, and did not remain in contingency under the will till the death of the last tenant for life without issue male. *Spinks* v. *Lewis*, 3 Bro. C. C. 355, is an authority to the same effect. *Holloway* v. *Holloway*, 5 Ves. 399, is a distinct and decisive authority in favour of the plaintiffs. There the testator bequeathed 5,000*l.* in trust for his daughter A. for life, and after her decease for such child or children as she should leave at her decease, in such shares as she should think proper; and, in case she should die leaving no child, then, as to 1,000*l.*, for her executors, administrators, or assigns, and, as to the remaining 4,000*l.*, in trust for such person or persons "as shall be my heir or heirs at law:" it was held that the 4,000*l.* vested in A. and the other two daughters of the testator, being his co-heiresses and next of kin *at his death*. The Lord Chancellor (Lord Alvanley) said: "A testator certainly may by words properly adapted shew that by such words persona designata, answering a a given character at a given time, is intended. But prima facie these words must be understood in their legal sense, unless by the context or by express words they plainly appear to be intended otherwise. In this case these words are not necessarily confined to any particular time; nor, from the nature of the gift, is there any necessary inference that it should not mean, what the law would take it to mean, heirs at the death of the testator." (102) It was

(102) Sir Thomas Plumer, M. R., in Cholmondeley v. Clinton, 2 Jac. & W. 115, speaking of this case, says: "The question as to the effect of legal import, and the presumption in favour of vesting, and as to the period of time to which the description of heir should be referred, where there are no words of gift fixing any particular time, came under the consideration of Lord Alvanley in the case of Holloway v. Holloway; and, though that great judge decided, that, in that case, the remainder vested in the persons answering the description of heirs at the time of the death, yet it is evident from the reasoning

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upon this doctrine that the court of Exchequer and this court proceeded in *Pearce* v. *Vincent*, 1 C. & M. 598, and 2 New Cases, 328. 2 Scott, 347. Suppose Richard Hake had died in the lifetime of the testatrix, leaving a son, could there be a doubt that that son would answer the description of "male relation nearest in blood to Richard Hake," and take under this limitation?

Ede, for the defendant.—At the death of the testatrix, Abraham Hake, the father of Richard and Abraham David, answered the description contained in the limitation in question: and it is not found by the case that Abraham David was heir-at-law of his father; it is consistent with what appears upon the face of it that Abraham may have left an elder son. [*Tindal*, C. J.—We can intend nothing that does not appear upon the case: and we cannot collect from that that Abraham left any other son than Abraham David.] The rule relied on for the plaintiff is not inflexible; it is subsidiary to the intention of the party; in order to ascertain the intention, the whole will must be looked at; and, if the intention is plain that the devise shall be contingent, such intention is a lawful one, and must prevail, so long as it does not infringe the rule against perpetuities (103)—*Bon* v. *Smith*, Cro. Eliz. 532; *Marsh* v. *Marsh*, 1 Bro. C. C. 293; *Pyot* v. *Pyot*, 1 Ves. sen. 335; *Miller* v. *Eaton*, Coop. C. C. 272; *Jones* v. *Colbeck*, 8 Ves.

Rule as to the vesting of remainders, not inflexible.

used in the judgment, that he considered the question to depend entirely upon intention, and that his decision in favour of the legal presumption proceeded entirely upon the ground that there was not a sufficient manifestation of a contrary intent. The whole of the judgment is important, and towards the conclusion of it his Lordship observes, 'I cannot, upon that ground alone, that the daughter named in the will was one of the heirs at law, hold that heirs at a particular time were intended. My opinion is, that there is not enough in this will to give the words any other than their prima facie construction, heirs at law at his own death. If so, it would be a vested interest in the persons answering that description at his own death."

(103) See Cadell v. Palmer, 3 M. & Scott, 571.

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38; *Phillips* v. *Deakin*, 1 M. & S. 744; per Bayley, J., in *Cholmondeley* v. *Clinton*, 2 B. & A. 625; per Sir Thomas Plumer, in the same case, 2 Jac. & W. 1; *Bird* v. *Wood*, 2 Sim. & Stu. 400; *Briden* v. *Hewlett*, 2 Mylne & K. 90; *Butler* v. *Bushnell*, 3 Mylne & K. 232: and see the elaborate judgment of Sir W. Blackstone, in *Perrin* v. *Blake*, Harg. Law Tracts, p. 489. [*Coltman*, J.—Has not *Bon* v. *Smith* been overruled?] It was recognized by Lord Hardwicke in *Pyot* v. *Pyot*. [*Erskine*, J.—*Jobson's* Case, Cro. Eliz. 576, is the other way.] Lord Hardwicke treats that as a very odd case. In *Leigh* v. *Leigh*, 15 Ves. 103, Lawrence, J., says, that, if the meaning of the words of a will, as they have been used by the testator, be ascertained, "no reasoning from supposed cases can induce the court to put a different construction upon the will, but can only lead to a conclusion that the testator did not see all the consequences of the disposition he may have made; yet, in endeavouring to ascertain the meaning of a testator, the absurdities, improbabilities, and inconsistencies which may arise out of cases falling within one construction or another, have constantly been attended to, with a view of ascertaining such meaning." In the present case, the court are called upon to suppose that the testatrix intended to give the remainder in fee to some one of the persons for whom she has already provided in the earlier part of her will—a circumstance that is altogether wanting in the cases cited. In *Doe* d. *Cholmondeley* v. *Maxey*, it was doubtful whether or not there was a gift to the heir. In *Driver* v. *Frank*, Lord Ellenborough, differing from the rest of the court, thought the intention of the testator must be looked at, and that no rule of law could be set up to countervail or defeat a lawful intention. In *Doe* d. *Garner* v. *Lawson*, the words of the devise over were "for and amongst such person and persons, his and their heirs &c., as shall appear and can be proved to be his next of kin, in such proportions as they would by virtue of the statute of distributions have been

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entitled to his personal estate if he had died intestate:" and it was held that the distribution was to be made amongst those who were the testator's next of kin *at the time of his death*. The provisions of the statute of distributions have reference to the time of the death; and this was relied on by Lord Ellenborough in his judgment. *Spinks* v. *Lewis* was also a clear case of a gift to such of the testator's next of kin (according to the statute) as should be living at the time of his death. *Holloway* v. *Holloway* was the case of a gift of personalty to heirs, which the Master of the Rolls thought equivalent to a gift to the next of kin, having reference to the time of the death. And in *Pearce* v. *Vincent*, the time of the death of the testator was expressly referred to.

Reply.

N. R. Clarke, in reply.—It is not insisted on the part of the plaintiffs that the rule as to the vesting of remainders is an inflexible rule; but that the rule must prevail, in the absence of any specific intention appearing to the contrary. In *Driver* v. *Frank*, 3 M. & S. 30, Dampier, J., says: "If a testator expresses an intention precisely, in clear and positive terms, and there is no legal objection to it, no inconvenience arising from a literal adherence to such intention so expressed is to be regarded. The case is very different where the intention is not fully expressed, but is to be collected and inferred as only probable. In that case, the probability, from which the intention is to be inferred, may be outweighed by the improbability that the testator could intend to make a distribution of his property attended with such inconveniences as would follow from carrying into execution his supposed intention." There is no suggestion of intention here—nothing to shew that the testatrix could have contemplated the postponement of the vesting until a period later than that of her death. And there is no objection to the ultimate limitation being given to one who takes an interest under the will—*O'Keefe* v.

Jones, 13 Ves. 413. In *Doe* d. *Garner* v. *Lawson*, Grose, J., referring to *Masters* v. *Hooper*, 4 Bro. C. C. 207, where an estate for life was previously given to the party through whom a share of the remainder over was claimed, says: "Nothing is more common than that an estate for life should be given to one to whom a remainder over in fee is afterwards devised." *Pearce* v. *Vincent* is an authority to the same effect. With the exception of *Bon* v. *Smith*, all the cases relied on for the defendant were cases relating to *personal* property, and in which (generally speaking) the whole interest was given in the first instance: and in all of them the intention was sufficiently apparent. The rule, however, is expressly restrained to the case of *real* estate—per Bayley, J., in *Driver* v. *Frank*, 3 M. & S. 37. *Marsh* v. *Marsh*, and *Jones* v. *Colbeck*, were also cases of executory devises, as to which no question can arise as to the time of vesting.

TINDAL, C. J.—The question is, whether there is, as contended on the part of the plaintiffs, a general rule, that, under circumstances like those in the present case, the ultimate limitation shall vest *at the death of the testator* (104), or whether it shall be postponed till the death of the last taker. On the part of the defendant, it is insisted that this is an open question, to be determined by the intention of the testator, as it is to be collected from the will. The authorities that have been cited on the one side and the other give rise to some doubt and difficulty. But, seeing that the cases relied on for the defendant are cases relating to personalty, and that the rule upon which the plaintiffs' claim rests has been restrained in its application to real property, I think our judgment must be for the

The rule as to the vesting of remainders does not apply to personalty.

(104) Here, and in a subsequent part of his judgment, the words used by his lordship were—"At the death of the first taker:" but from the general scope of the judgment, it is presumed that his lordship's words and intention differed.

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plaintiffs. I have always understood the general principle to be, that a remainder shall be construed to be vested at the earliest period at which it can be so held, unless a contrary intention be manifest. In conformity with the rule laid down in *Doe* d. *Garner* v. *Lawson*, 3 East, 278, and *Doe* d. *Cholmondeley* v. *Maxey*, 12 East, 589, we must, if there be nothing on the face of the will clearly indicating a contrary intention, hold that the remainder *vested at the death of the testatrix* (105). The only words here that are calculated to raise a doubt are these:—"And, in default of such issue, I give and devise the same premises unto such person bearing the surname of Hake, as *shall be* the male relation nearest in blood to the said Richard Hake, and to his heirs for ever." And it is contended, that, as these words denote a future period, they shew an intention that the remainder shall not vest until the period at which it becomes susceptible of enjoyment, viz. the death of the last taker. The same argument was urged in *Doe* d. *Garner* v. *Lawson:* but Lord Ellenborough said: "As to the words of description used being in the future; words to postpone the vesting in possession of an interest are naturally prospective. It could not be clear to the testator himself who would take under the description at the time of his death." And Grose, J., says: "Great stress has been laid on the words 'as *shall* appear and can be proved' &c. But the omission of the word *then*, which has occurred in other cases, shews that the trustees were not to look to the persons who should be the testator's next of kin at the time when the contingency happened, but, according to the plain meaning of the words used, to such as were his next of kin at the time of his death, who alone were entitled to take by the statute of distributions in case of his intestacy." It seems to me to be the safer course to adhere in this case to the general rule, which seems to me to be a

(105) His lordship's words were—"vested in the first taker under the will."

sound rule of construction; and therefore that the plaintiffs are entitled to judgment (106).

BOSANQUET, J.—I am of the same opinion. The general rule that a remainder is not to be construed to be contingent if it can be held vested, is not disputed. But it is said that that rule is not inflexible, but bends to the intention of the testator. No doubt the rule must give way to an intention that is clearly and unequivocally expressed. What are the words here? After giving successive life estates to Abraham Hake, to Richard Hake, and, in default of issue of Richard, to Abraham David Hake, with remainder in tail male to the sons of Abraham David—the testatrix proceeds as follows:—"And in default of such issue, I give and devise the same premises unto such person bearing the surname of Hake, as *shall be* the male relation nearest in blood to the said Richard Hake, and to his heirs for ever." Reliance is placed upon the words "shall be" denoting a future period. Taking the general rule to be as I have stated, it appears to me that we are bound to see that the intention that it shall not apply to this particular

(106) There were only two periods antecedent to the death of Abraham David Hake at which the remainder *could* vest—the death of the testatrix, and the death of Richard Hake. The death of the first taker, Abraham Hake, the father, could determine nothing. It is possible that the learned Chief Justice may have intended to hold that the remainder in fee vested at the death of Richard Hake. And this seems to be borne out by the case of Danvers v. The Earl of Clarendon, 1 Vernon, 35. There, goods were devised to A. for life, and, after the death of A., to the heir of B. B. dying in the life-time, of A, it was decreed that the goods should go to him that was heir of B. at his death, and not to him who was his heir at the death of A.

It may be observed also, that Richard Hake might have had a son who might have died in the lifetime of the testatrix, leaving a son. This grandson would, by reason of the lapse of the devise to his father in tail, be incapable of taking by descent under the limitations to the first and other sons of Richard Hake in tail, and yet he might clearly have taken under the description of Richard Hake's nearest male relation of that name, as contained in the ultimate devise; and that whether the time for ascertaining the person so to take was *the death of the testatrix*, or *the death of Richard Hake*.

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devise is clearly expressed, before we hold that the rule is not to prevail. It must be recollected, that, when a man makes his will, he always does it with reference to a future event: he cannot at the time know who will answer the description of the remainder-man. Here, no particular person or event is specifically pointed at: if, therefore, we find a person in whom the remainder *may* vest at the death of the testatrix, it seems to me that the general rule of law must prevail. The cases as to personalty cannot apply to a rule that is strictly applicable to realty only. In *Doe* d. *Garner* v. *Lawson*, 3 East, 278, where the testator devised to his natural son, and, in case of his marriage with certain persons, or his dying without issue, then to his nephew for life, and after his decease then for and amongst such person and persons, his and their heirs &c., as shall appear and can be proved to be his next of kin, in such proportions as they would by virtue of the statute of distributions have been entitled to his personal estate if he had died intestate: it was held that the distribution was to be made amongst those who were the testator's next of kin at the time of his death, though the nephew, to whom a prior life estate was given, were one of them. Next of kin according to the statute of distributions, was there properly held to mean next of kin at the time of the death of the testator: it was a mere amplification of the same expression.

COLTMAN, J.—I am of the same opinion. It is desirable to adhere as much as possible to general rules of construction: all unnecessary deviations therefrom are calculated to give rise to doubt and uncertainty in the administration of justice. The general rule is, that a remainder shall vest at the earliest period that is consistent with the expressed intention of the testator. There seems to me to be nothing upon the face of this will to indicate an intention on the part of the testatrix to create an exception out of that general rule. There is nothing in the argument, that, according to this construction, the same person would take a

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life estate and also the ultimate remainder in fee: there is nothing unusual or inconsistent in that. It is difficult to reason upon the probable intention in one case from the facts and intention in another: each case must in general depend upon its own peculiar circumstances and the expressions used. Some of the cases cited on the part of the defendant (and in particular that of *Butler* v. *Bushnell*, 3 Mylne & K. 232) raised some doubt in my mind. But they are all cases relating to personal property, to which the rule does not apply, or cases of executory devises; and therefore they are not authorities for our guidance in this case.

ERSKINE, J.—If the testatrix in this case had expressed an intention as clearly as was expressed in *Pearce* v. *Vincent* and *Phillips* v. *Deakin*, there would have been no necessity to recur to the general rule. But the absence of such clear expression of intention throws us back upon the rule, which clearly establishes that the remainder shall vest in interest at the earliest possible moment, unless a contrary intention is unequivocally manifested.

Judgment for the plaintiffs.

PEARSON and Another *v.* YEWENS.

Thursday, May 2nd.

The defendant was arrested by one S. who at the time had no warrant from the sheriff; in order to give a false colour of legality to the caption, S. procured one N., who had a warrant against the defendant at the suit of another plaintiff, to hand over that warrant to him, and the under-sheriff altered the warrant by substituting the name of S. for that of N. as the officer by whom it was to be executed:—Held, that the defendant was not in the lawful custody of S., and that, the sheriff having, by the alteration of the warrant, become a party to the illegal act of the officer, the defendant was not liable to be detained upon other writs then in the sheriff's hands.

Held also, that the defendant did not, by suing out a habeas corpus to remove himself into the custody of the Warden of the Fleet, admit himself to be in the legal custody of the sheriff.

THE defendant was, on the 2nd April last, accosted whilst in a banking-house in Henrietta Street, Covent Garden, by a person who told him he had a warrant against him, and, notwithstanding his resistance, he was forcibly conveyed to the lock-up-house of one Sloman, in Chancery

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Lane. There were several writs out against the defendant; amongst others, one at the suit of James and Robert Robinson. The warrant issued upon this writ was directed to and was in the possession of another officer named Nathan. This warrant was handed over to Sloman, having first been indorsed by Nathan—"Not executed by me. L. J. Nathan. 3rd April, 1839"—and altered by the under-sheriff by the substitution of the name of Sloman for that of Nathan, as the officer by whom it was to be executed. This warrant was shewn to the defendant as the authority for his arrest.

An application was afterwards made by the defendant to a judge at chambers to be discharged out of custody. The judge declining to make any order, the defendant sued out a writ of habeas corpus with a view to his removal to the Fleet. The sheriff returned to this writ that he had arrested the defendant at the suit of James Robinson and Robert Robinson, and that he was detained in custody at the suit of the plaintiffs in this action, and by three other plaintiffs in three other actions.

Upon an affidavit of these facts—

Wilde, Serjeant, on a former day in this term, obtained a rule to shew cause why the defendant should not be discharged out of custody as to this action, on the ground that he was arrested without any warrant; and also calling upon Sloman to shew cause why he should not pay the costs of the application.

Gunning, for the plaintiffs, submitted that, the sheriff being no party to the alleged illegal proceedings on the part of Sloman, the defendant was well in custody in this action—*Howson* v. *Walker*, 2 Sir W. Blac. 823; *Barratt* v. *Price*, 2 M. & Scott, 634, 9 Bing. 566.

Hoggins, for Sloman, produced an affidavit in which it was sworn, that, at the time of the arrest, Sloman acted

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upon an impression that he held a warrant against the defendant in an action at the suit of one Maclaren; but it turned out upon inspection that the warrant, which had been granted by the late sheriff, had not been renewed; that Sloman thereupon offered to liberate the defendant; and that subsequently, in order to justify his detention, he had procured the warrant from Nathan as above stated.—It is perfectly clear, that, where the sheriff arrests a defendant in one action, it virtually operates as an arrest in all the actions in which the sheriff holds writs against him at the time; and that the court will not discharge him from custody under detainers subsequently lodged against him, unless the original arrest is illegal, and the sheriff is himself a party to such illegal arrest—*Howson* v. *Walker*, 2 Sir W. Blac. 823; *Davies* v. *Chippendale*, 2 B. & P. 282; *Barclay* v. *Faber*, 2 B. & A. 743; *Arundel* v. *Chitty*, 1 Dowl. 499; *Barratt* v. *Price*, 2 M. & Scott, 634, 9 Bing. 566. Tindal, C. J., in delivering the opinion of the court in the case last cited, says: "The principle to be derived from the cases appears to be, that, where the sheriff arrests the defendant in one action, it operates virtually as an arrest in all the actions in which the sheriff holds writs against him at the time; for, it would be only an idle and useless ceremony to arrest the defendant in the rest—it would be "actum agere:" and this detainer will hold good, although the court may, upon collateral grounds, unconnected with the act of the sheriff, order the party to be discharged from the first arrest. But, where the sheriff has, by his own act, illegally arrested the defendant, the defendant is not in custody under the first writ; he is suffering a false imprisonment: and such false imprisonment, being no arrest in the original action, cannot enure as an arrest under the other writs lodged with the sheriff." Here, it is not suggested that the sheriff is any party to the illegality that has taken place: for the purpose of this inquiry, Sloman was a mere wrongdoer. [*Tindal*, C. J.—If Sloman be considered a

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mere wrongdoer, the defendant never was in the custody of the sheriff, and therefore the writs in the sheriff's hands could not operate his detention.] The defendant has admitted himself to be in custody on the detainer at the suit of the present plaintiffs: and by his own act he is now in the custody of the Warden of the Fleet. [*Erskine*, J.— His admission amounts to no more than that he is in custody under colour of a detainer, not that he is legally in custody.]

Wilde, Serjeant, and *Humfrey*, in support of the rule.— The sheriff never has had the defendant in legal custody at all: but he has thought proper (as appears by his return to the habeas corpus) to adopt the bailiff's illegal act as to all the actions in which writs were at the time in the office. The case of *Barratt* v. *Price*, therefore, is an authority distinctly applicable.

Cur. adv. vult.

TINDAL, now delivered the opinion of the court:—

This was an application by the defendant to be discharged out of custody as to this action, in which he was detained under colour of a writ of capias ad satisfaciendum, upon which at the time of the arrest no warrant had been issued.

By the affidavits it appeared that the defendant had been arrested in an action at the suit of Isabella Maclaren, by one Sloman, who had a warrant from the late sheriff of Middlesex to arrest the defendant, but had no warrant from the present sheriff; and the defendant was thereupon forcibly taken to Sloman's lock-up-house in Chancery-Lane. At that time there were several writs in the sheriff's office against the defendant, and, during the time the defendant was in the custody of Soloman, a warrant which had been issued on one of them at the suit of James Robinson and Robert Robinson, and which was in the pos-

session of an officer of the name of Nathan, to arrest the defendant, was, at the request of Sloman, delivered to him by Nathan, an indorsement having been made thereon by Nathan in these terms—" Not executed by me. L. J. Nathan. 3rd April, 1839;" and the warrant was then altered by the undersheriff, by inserting in it the name of Sloman as one of the officers to execute it.

An application was afterwards made by the defendant to a judge at Chambers to be discharged out of custody. The judge declined to make any order; aud thereupon the defendant sued out a writ of habeas corpus, in order to his being removed into the custody of the Warden of the Fleet. To this writ the sheriff returned that he had arrested the defendant at the suit of James Robinson and Robert Robinson, and that he was detained in custody at the suit of the plaintiffs in this action, and by three other plaintiffs in three other actions.

A rule nisi was obtained as against the plaintiff in this action, and Sloman, the sheriff's officer, for the discharge of the defendant. On shewing cause against this rule, it was contended that Sloman, in making the original caption, having no warrant from the sheriff, was to be looked on as a mere stranger, and that the wrongful act of a stranger in imprisoning the defendant could not operate to prevent the sheriff from detaining the defendant by virtue of the writs in the office, which attached as soon as the party was brought into the custody of the sheriff, though wrongfully brought, provided the sheriff was no party to the wrong; for which the cases of *Howson* v. *Walker*, 2 W. Blac. 823, and *Arundel* v. *Chitty*, 1 Dowl. 499, were cited. But it appears to us, that, if Sloman is to be considered as a mere stranger in making the original caption, the defendant cannot be considered as having been in the custody of the sheriff by being taken to Sloman's lock-up-house; for, the lock-up-house of Sloman is not the prison of the sheriff, and the earliest period at which any writs in the sheriff's

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office could in that case attach, would be when the name of Sloman was inserted in the warrant. We cannot, however, consider the defendant as being lawfully in the custody of Sloman in consequence of the insertion of his name in the warrant originally issued to Nathan. It must, we think, be considered as a collusive act, intended to give a false colour of legality to the original caption of the defendant by Sloman, and as having in effect made the sheriff a party to the original illegality committed by Sloman, so far, at least, as to prevent the detainers from attaching. If the sheriff had issued a warrant to Sloman in the action at the suit of Maclaren, after the original caption, he would thereby clearly have made himself a party to the original wrongful caption: and we cannot think that he is less a wrong-doer in consequence of his having proceeded by a less direct course to effect that which appears intended to produce the same end; and the case therefore appears to us to fall within the principle of the case of *Barratt* v. *Price*, 2 M. & Scott, 634, 9 Bing. 566.

It was suggested in the course of the argument that the defendant, by suing out the writ of habeas corpus, and removing himself into the custody of the Warden, had admitted himself to be in the legal custody of the sheriff, and that by consequence the writs in the office had attached. But it does not appear to us that this admission ought to prejudice the defendant. A warrant having been issued to Sloman to arrest him, *the fact* could not be controverted that he was in the custody of the sheriff; but it was open to the defendant before his removal to controvert the *legality* of such custody: and we see nothing in the form of the writ of habeas corpus that should estop him from still controverting it.

We therefore think the rule should be made absolute.

Rule absolute.

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PETCH *v.* FOUNTAIN.

Thursday, May 2nd.

AN agreement was entered into between the plaintiff and defendant, under which the latter took from the former certain premises at the yearly rent of 63*l.*, payable quarterly; and the plaintiff agreed to pay the defendant twenty guineas a year each for the board of twenty-three young ladies, by quarterly instalments, on the 1st August, the 1st November, the 1st February, and the 1st May in each year. Three days after the first quarter's rent became due, viz. on the 27th June, 1838, the plaintiff brought an action to recover it. At this time the defendant had earned 129*l.* 6*s.* 9*d.* for the board of the young ladies, but this sum would not by the terms of the agreement become due until the 1st August. The defendant, however, pleaded this debt as a set-off to the action, in addition to non-assumpsit. Upon both pleas the plaintiff joined issue.

An action had also been commenced by the plaintiff against the defendant for an alleged slander. On the 27th July, "all matters in difference between the parties, including the *claim* of the defendant in her set-off in the first action," were by a judge's order, referred to arbitration. The arbitrator (the first hearing was on the 28th November following) made his award. As to the first action, he directed a verdict to be entered for the plaintiff on the first issue, for 15*l.* 15*s.*, and negatived the alleged set-off; as to the second action, he found that the plaintiff had no cause of action against the defendant; and, as to the matters in difference, he found that 129*l.* 6*s.* 9*d.* were due from the plaintiff to the defendant on the 1st August, and directed that that sum should be paid accordingly.

To an action for use and occupation commenced on the 27th June, the defended pleaded non assumpsit and a set-off of 129*l.* 6*s.* 9*d*, a claim that would only arrive at maturity on the 1st August. An action of slander having also been brought by the plaintiff against the defendant, it was agreed (by a judge's order, dated the 27th July) that the causes and all matters in difference between the parties "including the *claim* of the defendant in her set-off in the first action," should be referred to arbitration. The arbitrator some months after made his award, directing a verdict to be entered for the plaintiff in the first action for 15*l.* 15*s.*, and negativing the alleged set off; he also found that there was no cause for the second action; and, as to the matters in difference, he awarded that the plaintiff should pay to the defendant 129*l.* 6*s.* 9*d.*:—Held, that the arbitrator had properly adjudicated upon the subject-matter of the alleged set-off, as a matter in difference between the parties.

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Wilde, Serjeant, on a former day in the term, obtained a rule calling upon the defendant to shew cause why the award should not be set aside as to so much of it as directed the payment by the plaintiff to the defendant of the 129*l.* 6*s.* 9*d.*, on the ground that, that claim arising subsequently to the date of the order of reference, it was not a matter in difference submitted to the arbitrator, and therefore it was not competent to him to order payment of it.

Bingham now shewed cause.—The sum in question was clearly a matter in difference within the contemplation of the parties at the time the order of reference was made. To constitute a matter in difference, it is not essential that the claim should be a strictly legal one. It would be absurd to suppose that the defendant ever would have consented to a reference that did not embrace a claim which she would in three days be in a situation to enforce at law.

Wilde, Serjeant, in support of his rule.—The reference was of the two causes, including the claim of the defendant in her set-off in the first action, and all matters in difference between the parties. Now, the sum which the arbitrator has directed the plaintiff to pay to the defendant clearly was not a matter that could properly form the subject of a set-off, inasmuch as it was not due at the time of the commencement of the action: and it could not be a matter of difference aliundè: for, there was no dispute as to the agreement.

TINDAL, C. J.—The question turns upon what was the real intention of the parties in entering into the order of reference. If the words used be such as clearly to shew that the parties mutually intended to make a clear end of all differences and claims between them, then the arbitrator has done right in treating the claim of the defendant as

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one of the matters in difference submitted to him. If it had been intended that the defendant should be tied down to that which was strictly and properly the subject of a set-off to the plaintiff's demand in the action, there was no necessity for putting in the special words. We are therefore led to conclude that something more was intended. Though not in strictness a matter of set-off in the action, this was at all events a *claim*, which, whether well or ill-founded, is expressly made a part of the reference. I think the arbitrator has done right, and consequently that the rule that has been obtained for setting aside his award must be discharged.

BOSANQUET, J.—I am of the same opinion. The question turns entirely upon the intention of the parties as expressed in the order of reference. The order of reference expressly includes "the *claim* of the defendant in her set-off." The arbitrator, therefore, was bound to inquire into and to decide upon the nature of this claim. He has properly decided that the defendant had no strictly legal set-off. He then proceeds to consider the nature of the *claim*; and, though he finds that it did not constitute a defence to the action, still he finds the subject-matter of that claim to be a matter in difference between the plaintiff and defendant, and awards accordingly. I think he has not exceeded his authority.

COLTMAN, J.—I am inclined to think that the view taken by the rest of the court is the right one, though it does not distinctly appear that the claim in question was properly the subject of a set-off.

ERSKINE, J.—I think the words of the order of reference are wide enough to embrace this claim as a matter in difference between the parties; and therefore that the arbitrato has done right in awarding payment of it by the plaintiff.

Rule discharged.

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Friday, May 3rd.

MILLS *v.* FOWKES.

Mutual debts, there being no written accounts between the parties, are not within the exception in the statute of limitations.

Where a creditor has two several demands against his debtor, one barred by the statute of limitations, the other not, a part payment, to take the case out of the operation of the statute, must be expressly made on account of the older debt.

But, in the absence of any express appropriation by the debtor at the time of making it, the creditor is at liberty to appropriate the payment towards satisfaction of that portion of the debt which the statute would bar.

THIS was an action of debt. The declaration contained counts for several demands. The defendant pleaded, amongst other pleas, set-off, payment, and the statute of limitations, and, to one count of the declaration, payment into court of 107*l.* 4*s.* 5*d.* The plaintiff replied to the set-off, nil debet as to part of the sum claimed to be set off, and the statute of limitations as to the residue. Issues thereon.

The cause was referred. The arbitrator found, first, with reference to transactions barred in point of time by the statute of limitations, that there was a debt due from the defendant to the plaintiff for rent and other things, which had been reduced by payments to 156*l.* 19*s.* 7*d.*; that there was a cross debt or set-off due from the plaintiff to the defendant accrued during the same time, amounting to 51*l.* 10*s.* 6*d.*: secondly, as to the time within six years before the commencement of the suit, that the defendant was indebted to the plaintiff in the sum of 150*l.* 0*s.* 5*d.*; that the defendant was entitled to a set-off of the sum of 7*l.* 16*s.*, and that the payment into court must be applied, and the arbitrator did apply the same, to that part of the account; that the defendant had also paid the sum of 20*l.* to the plaintiff, which must be applied, and the arbitrator did apply it also to that part of the account, that is to say, he applied the said sums paid and paid into court to that part of the plaintiff's demand which had accrued within six years next before the commencement of this suit; that there was not at any time any written statement of the account between the parties signed by them or either of them; that the defendant did, on or about the 22nd April, 1837, pay to the plaintiff the sum of 15*l.*; that, before and at the time that the defendant paid the said sum of 15*l.*, it was known to both parties that there were unsettled cross demands

15*l.* paid without appropriation on either side.

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No appropriation by either party.

between them, partly within and partly without the time limited by the statute; that there was no appropriation in fact of the sum of 15*l.* either by the plaintiff or the defendant; and that there did then exist a debt not barred by the statute, considerably exceeding in amount the sum of 15*l.*, to which debt the payment might then have been referred.

The arbitrator then awarded and directed, that, if the court should be of opinion, that, under the above circumstances, the plaintiff might treat, or the court might treat, the payment of the said sum as a part payment of the debt that existed more than six years before the commencement of the suit, or, if the court were of opinion that the fact that there were cross demands between the parties without any written statement of them signed by the parties or either of them, was sufficient to take the case out of the statute of limitations, then that the defendant should pay to the plaintiff the sum of 156*l.* 10*s.* 6*d.*, if the court should be of opinion that the defendant was not entitled to the benefit of the set-off accruing to him more than six years before the commencement of the suit; but the defendant was to pay to the plaintiff the sum of 105*l.* 9*s.* 1*d.* only, if the court should be of opinion that he was entitled to the benefit of the last-mentioned set-off. But, if the court should be of opinion that the whole case was not taken out of the statute under the circumstances, but that the plaintiff was at liberty to appropriate, or, in contemplation of law, must be taken to have appropriated, the said sum of 15*l.* to the debt existing more than six years before the commencement of this suit, then the defendant was to pay to the plaintiff the sum of 15*l.* If the court should be of opinion that the payment of the said sum of 15*l.* must, under the circumstances, be taken to be a part payment on account of the debt which accrued within six years before the commencement of the suit, then the arbitrator found, that, taking into account the sum paid into

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court, the plaintiff never had been fully paid and satisfied by the defendant, and awarded that the plaintiff was not entitled to recover anything from the defendant.

Humfrey, for the defendant.—Three questions are presented for the consideration of the court in this case—first, whether the account between the parties was such as to prevent the statute of limitations from attaching—secondly, whether the payment of the 15*l.*, under the circumstances stated, takes the case out of the statute—thirdly, whether, supposing the payment of that sum does not take the whole case out of the operation of the statute, such payment by the rule of law necessarily appropriates itself to the old debt.

1. Account not such as to take the case out of the statute.

1. Since the statute 9 Geo. 4, c. 14, a mere open account will not take a case out of the statute of limitations—*Williams* v. *Griffiths*, 2 C. M. & R. 45; *Waters* v. *Tompkins*, 2 C. M. & R. 723. [*Waddington*, contrà, conceded that these authorities were conclusive upon the first point.]

2. The payment of the 15*l.* not such a part payment as to prevent the statute from attaching.

2. The payment by the defendant of the 15*l.*, without any specific appropriation on either side, clearly was not such a payment as would have the effect of taking the earlier part of the plaintiff's demand out of the statute. The statute 9 Geo. 4, c. 14, leaves the fact of payment precisely as it stood before. Nothing is more clear than that, in order to give a part payment the effect of taking a case out of the statute, it must be shewn to have been expressly made in respect of the particular debt which it is sought to take out of the statute, and in *part* payment of that debt—*Tippets* v. *Heane*, 1 C. M. & R. 252, 4 Tyr. 772. Parke, B., there says: "In order to take a case out of the statute of limitations by a part payment, it must appear, in the first place, that the payment was made on account of a debt. That was left in ambiguity in the present case. Secondly, it must appear that the payment was made on account of the debt for which the action is brought. Here,

the evidence does not shew any particular account to which the payment was applicable. The jury seem to have considered it as a payment of part of the debt in question; and, perhaps, as there was no other account found to have been in existence between the parties, they might be warranted in so doing. But the case must go further; for, it is necessary, in the third place, to shew that the payment was made as part payment of a greater debt; because the principle upon which a part payment takes a case out of the statute, is, that it admits a greater debt to be due at the time of the part payment. Unless it amounts to an admission that more is due, it cannot operate as an admission of any still existing debt." In the present case, there being a debt due from the defendant which was not barred by the statute, in the absence of proof that the payment was on account of the older debt, which was barred by the statute, it must be taken to have been made in respect of the debt for which he was still liable.

3. It is found by the arbitrator that the 15*l.* paid on account was appropriated by neither party. The rule of the civil law, which is adopted by the Master of the Rolls in *Clayton's* Case, 1 Meriv. 57, and since followed by all the courts, is, that the right of appropriation in the first place is in the debtor; if he omits to make any appropriation, the creditor may make it; if neither party appropriates the payment, the law, where there are several debts, applies it in discharge of that which is the most burthensome—to a debt bearing interest, in preference to one that does not; or to a debt that would expose the debtor to a commission of bankruptcy, in preference to one that would not—*Meggot* v. *Mills*, 1 Lord Raym. 286; *Dawe* v. *Holdsworth*, Peake, 64. In the present case, the most burthensome debt was that which accrued within six years, and therefore the payment must be ascribed to that. In *Peters* v. *Anderson*, 5 Taunt. 596, 1 Marsh. 238, it was held that where money is due upon two accounts, if the payer does

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not pay specifically on one account, the receiver may afterwards appropriate the payment to the discharge of either, at his election: and that, if he sue on each account, it seems that he thereby declares his election, and the defendant cannot, by a subsequent notice of set-off, elect to which account he will ascribe the payment. Sir William Grant, however, in *Clayton's* Case, ascribes very little weight to that authority. Besides, here, the bringing the action was no election on the part of the plaintiff; for, a much larger sum was due to him, arising within six years, and his action is brought for the whole: and, the plaintiff having made no election, the defendant's right of election revives; and this he has declared by paying money into court on account of the more modern debt. Where a party has a legal demand and one that is illegal, and a payment is made generally, he cannot appropriate it in discharge of the illegal demand—*Wright* v. *Laing*, 4 D. & R. 783, 3 B. & C. 165. In *Bodenham* v. *Purchas*, 2 B. & A. 39, and *Simson* v. *Ingham*, 3 D. & R. 249, 2 B. & C. 65, there was nothing to prevent the creditor from making the appropriation.

Plaintiff entitled to appropriate the 15*l.* to the earlier debt.

Waddington, contrà.—Even if the payment of the 15*l.* does not take the case out of the statute, the plaintiff is still entitled to judgment for that sum. There having been no specific appropriation of it by the debtor at the time of paying it, the creditor had a right to appropriate it, even down to the time when the parties were before the jury; or at all events the law will, according to the doctrine in *Clayton's* Case, *Bodenham* v. *Purchas*, and *Simson* v. *Ingham*, appropriate it to the earlier items in the account. In *Bodenham* v. *Purchas*, Bayley, J., says: "It certainly seems most consistent with reason, that, where payments are made upon one entire account, such payments should be considered as payments in discharge of the earlier items." And the same learned judge, in *Simson* v. *Ingham*, says:

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"There are three general rules applicable to cases of this nature which it is necessary to keep in view—first, that ordinarily the party who pays in money has the liberty of applying it specifically to whichever of two accounts he chooses, either the old one or the new; second, that, where he makes no election, but pays the money in generally, the party to whom it is paid becomes entitled to the same liberty, unless the exercise of it is calculated to work injustice; and, third, that, where two partners are jointly indebted, and one dies, and the survivor keeps on an account with the creditor, who unites the two accounts, these subsequent payments must be applied in liquidation of the old debt." There is no foundation for the position contended for on the part of the defendant, that, in the absence of a specific appropriation by either party, the law will appropriate the payment to the more burthensome of two demands. In *Manning* v. *Westerne*, 2 Vern. 606, the defendant, being indebted to the plaintiff on specialty and also on simple contract, made several payments of sums in gross; and the question was, whether these sums should be applied towards satisfaction of what was due on the articles, which carried interest, or in satisfaction of the debt by simple contract. And the Lord Chancellor said: "Although the rule of law is, that quicquid solvitur solvitur secundum modum solventis, yet that is to be understood when at the time of payment he that pays the money declares upon what account he pays it: but, if the payment is general, the application is in the party who receives the money." This case was referred to in *Clayton's* Case, but is not noticed by the Master of the Rolls in his judgment. In *Hawkshaw* v. *Rawlings*, Str. 24, Parker, C. J., says: "Suppose a man owes me 100*l.* upon bond, and another 100*l.* upon another account, and he pays me 100*l.*; I may apply it to which I will; and though he paid it in satisfaction of the bond, yet if I did not receive it as such, it will be no discharge of the bond." And see *Goddard* v. *Cox*, Str.

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1194. In *Kirby* v. *The Duke of Marlborough*, 2 M. & S. 18, where a bond was entered into by A. and B. to the plaintiffs, to enable A. to carry on his trade, conditioned for the payment of all such sums not exceeding 3,000*l.* which should at any time thereafter be advanced by the plaintiffs to A.: it was held that payments made generally to the plaintiffs on account of A., might be applied by them in liquidation of a balance existing against A., before the execution of the bond, and that B. could not insist upon their being applied in exoneration of his liability on the bond, although at the time of his entering into it the plaintiffs did not give him notice that any balance was then existing against A. So, in *Bosanquet* v. *Wray*, 6 Taunt. 597, it was held that a creditor receiving money without having any specific appropriation by the debtor, may in a court of law ascribe his receipt to the discharge of a prior and purely equitable debt, and sue him at law for a subsequent legal debt. Upon this point *Philpott* v. *Jones*, 2 Ad. & E. 41, is a strong authority in favour of the plaintiff. There, the plaintiff, in an action of debt, proceeded for 18*l.*, but delivered a particular of demand containing items to the amount of 11*l.* for spirits supplied in quantities not amounting to 20*s.* at a time, and 23*l.* 2*s.* for other articles; it appeared at the trial that the defendant had paid the plaintiff 17*l.*, but there was no proof of any appropriation of the payment by either; the jury having found that the plaintiff had appropriated 11*l.* of the 17*l.* already paid, to the demand for spirits; it was held that such finding was not in contravention of the statute 24 Geo. 2, c. 40, s. 12, which prohibits any recovery for spirituous liquors, unless the debt shall have been contracted at one time to the amount of 20*s.* The only authorities at all in point for the defendant, are, *Meggot* v. *Mills* and *Dawe* v. *Holdsworth*; as to which Gibbs, C. J., in *Peters* v. *Anderson*, 5 Taunt. 602, observes: "It is only the circumstance of the payer being a trader, and the consideration of bankruptcy, which

made it a question there. In *Meggot* v. *Mills*, however, the debts were both for goods, both arose on the same account, and it was wholly immaterial to which end of the account the payment might be applied: and Lord Holt thought it should be inferred that the payer intended it to be so applied as to avoid what was then thought the criminality of a bankruptcy. The court would presume the defendant did not mean to commit an offence. So, in *Dawe* v. *Holdsworth*, if the first debt, incurred while he was a trader, was paid off, there was no petitioning creditor's debt: if it was not paid, there was a good petitioning creditor's debt. I consider this case as standing on the authority of the case in Lord Raymond, and that the court meant to say that it would be too hard that a man having made a payment sufficient to exempt him from the operation of the bankrupt laws, should not have the benefit of paying off that part of his debt which subjected him to those laws. Lord Kenyon and Lord Holt went both on this ground: it is an exception, and founded on the circumstance of bankruptcy."

TINDAL, C. J.—There are in effect two points to be considered in this case—first, whether the payment of 15*l.*, by the defendant to the plaintiff in April, 1837, was such a part payment as will take the case out of the operation of the statute of limitations, as to that part of it which was contracted more than six years before the commencement of the action—secondly, whether, supposing that it is not, the plaintiff had under the circumstances a right to appropriate that sum in part discharge of the debt so barred by the statute.

1. I am of opinion that the payment in question was not such a payment as will take the case out of the statute. I consider the law to have been correctly laid down by the court of Exchequer in *Tippets* v. *Heane*. Whether or not the payment is such as will take the case out of the statute,

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is to be made out either by direct evidence or by inference from the course of dealing between the parties. In the present case there was no evidence whatever to shew that the 15*l.* was intended to be applied in part satisfaction of the old debt: and though a continuous account consisting of some items accruing before and some within the six years, constitutes but one debt: yet, when we find in the statute a proviso "that nothing therein contained shall alter or take away or lessen the effect of any payment of any principal or interest made by any person whatsoever," we have a right to suppose, inasmuch as the statute has relation to barring the creditor's remedy, that there was in the mind of the legislature some distinction between that part of the account which is and that part which is not covered by the statute; and that the payment which is to take the case out of the statute must be expressly a payment in respect of that part of the debt which would, but for this proviso, be barred by the statute. Inasmuch therefore, as there was no evidence to shew that the debtor intended to apply the payment in question in discharge of the earlier items, such payment does not exempt those parts of the debt from the operation of the statute of limitations.

2. Plaintiff's right to appropriate the payment.

2. Then comes the second question, which stands upon a materially different footing—whether, in the absence of a specific appropriation by the debtor, the creditor had a right to appropriate the 15*l.* so paid, in part satisfaction of that portion of the account which was barred by the statute. I conceive, that, though the creditor's remedy for the old debt is barred by the statute, yet the law with respect to the appropriation of payments remains as it was before.

Rule as to appropriation to the more burthensome debt, not known to our law.

On the part of the defendant, it is contended, upon the authority of the Civil Law, that, where there are two debts, the one more burthensome than the other, and the debtor makes a payment generally, unless the creditor immediately exercises his right of appropriation, the law will apply the

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payment so made in discharge of that debt which is the most burthensome. I know of no such rule is our law. The rule appears to be this:—the debtor has the right in the first instance to appropriate the payment to any particular account—solvitur in modum solventis; if the debtor makes no appropriation, the creditor has the right—recipitur in modum recipientis: and if neither of them makes any specific appropriation, the law applies the payment in discharge of the earlier items in the account. Here the debtor has not exercised his right of appropriation: therefore the right of the creditor is let in. The great struggle made on the part of the defendant, was, that, in the absence of appropriation by either party, the law applies the payment in satisfaction of that debt which is the most burthensome. The cases, however, seem to me to establish the contrary. In one of the earliest, *Goddard* v. *Cox*, 2 Str. 1194, the facts were these:—Samuel Owen was indebted to the plaintiff for coals. He died, and made his wife executrix. She continued to deal with the plaintiff, and received coals on her own account: then she married the defendant, who also received coals on his own account, and made several payments generally upon account. These payments, if applied to the debt due from the executrix and her debt whilst a widow, cleared both those accounts, and the action was brought against the defendant only for what was delivered in his time. The question was, who had the right of applying these payments, there being no direction from the defendant, who it was agreed had the first right. And Lee, C. J., held "that thereby it devolved to the plaintiff. And the defendant being by the marriage equally a debtor for what his wife received dum sola and for what was after, the plaintiff might apply the money received to discharge the wife's own debt: but, as to the demand against her as executrix, the validity of which depended on the question of assets, and manner of administering them, he was of opinion the plaintiff could not

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apply any of the money paid by the defendant to the discharge of that demand." So, in *Philpott* v. *Jones*, 2 Ad. & E. 41, where there were two debts, the one a legal debt, the other a debt which the plaintiff was by the statute 24 Geo, 2. c. 40, s. 12, precluded from recovering, it was held that the creditor had a right to appropriate payments made generally on account in discharge of that debt which the statute prevented his suing for. "If," says Lord Denman, "this action were brought for the 11*l.* 2*s.* claimed for spirits, the statute would be an answer: but the action is not brought for that; the plaintiff seeks to recover what is due after that has been paid. The question is whether the jury were warranted in saying that the former payment was on account of the spirits. The defendant made no appropriation of that payment; the plaintiff, therefore, might elect at any time to appropriate it to this part of his demand." And Taunton, J., added, that the plaintiff might make the appropriation "at any time before the case came under the consideration of a jury." In *Peters* v. *Anderson*, 5 Taunt. 596, 1 Marsh. 238, where two debts were due to the plaintiff, one on a covenant, the other on a simple contract, and payments had been made generally on account, the plaintiff was permitted to ascribe those payments to the debt for which he had the worse security. So, in *Bosanquet* v. *Wray*, 6 Taunt. 597, a creditor receiving money without any specific appropriation by the debtor, was held entitled to ascribe his receipt to the discharge of a prior and purely equitable debt, and sue him at law for a subsequent legal debt. These cases all appear to me to shew that the rule is as I have above stated it. *Simson* v. *Ingham*, 3 D. & R. 249, 2 B. & C. 65, also lays down the rule in the same terms. Best, J., there says that the creditor's appropriation should be made within a reasonable time. But it is not necessary on the present occasion to consider that; for, I am not prepared to say that the appropriation made when the parties were before the arbitrator was not

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made within a reasonable time. This is not the case of two debts, the one more burthensome than the other: it is simply the case of a debt as to one portion of which the defendant may if he thinks fit set up the statute of limitations as a bar. That he will do so, cannot be anticipated. I therefore think the plaintiff had a right to appropriate the 15*l.* in discharge of the earlier items of the account, and consequently that he is entitled to judgment for that sum.

BOSANQUET, J.—This action is brought to recover a debt one portion of which accrued more and the other less than six years before the commencement of the suit. The defendant has pleaded the statute of limitations. Three points have been raised by the argument. Upon the first point, the case of *Williams* v. *Griffiths*, 2 C. M. & R. 45, in a decisive authority to shew that this is not such an open account as will take the case out of the statute of limitations, since the 9 Geo. 4, c. 14. First point.

The second question is, whether the payment of the 15*l.* on the 22nd April, 1837, was such a payment as will prevent the operation of the statute. In order that a part payment may enure to take a case out of the statute of limitations since the 9 Geo. 4, c. 14, it must appear to be a payment of principal or interest in respect of the debt which is the subject of the claim: and, in order to establish that, there must be express evidence that the payment was made on that account. There was no evidence in the present case to shew that the payment was made on account of the earlier part of the debt; and it is from the act or acknowledgment of the debtor that the promise is to be inferred. I therefore see no ground for holding that this payment kept alive the old debt. Second point.

Then comes the third question—whether, in the absence of a specific appropriation by the debtor at the time of payment, the creditor has not a right to appropriate this sum of 15*l.*, which was paid generally on account, to the Third point.

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more antient portion of the debt. It is clear, from the finding of the arbitrator, that this payment was not appropriated at the time by any act of the debtor; and it is equally clear that the right accrued to the creditor to make the appropriation if he thought fit. No actual appropriation appears to have been made by either. But, the right accruing to the plaintiff, the question is whether he must not under the circumstances be taken to have made his election. The whole was a *subsisting debt*, though, as to part, the creditor's remedy was barred, if the debtor thought fit to plead the statute of limitations. It was therefore the plaintiff's interest to apply the payment in part discharge of the older debt. His right so to appropriate it continued to the time of the commencement of the action. The cases referred to by my Lord Chief Justice seem to be decisive—*Bosanquet* v. *Wray* in particular. I am not aware of any case where it has been held to be indispensibly necessary that the creditor should before the bringing of the action manifest his election to appropriate by any specific act. The plaintiff having a right to apply the 15*l.* to the old debt, it appears to me that he is entitled to judgment for that sum.

Second point.

COLTMAN, J.—Two points only were seriously contested; the other was merely hinted at. Of these two points, the first was, whether the payment of 15*l.* on the 22nd April, 1837, was a sufficient payment to take the case out of the statute of limitations—the plaintiff having two demands, the one barred by the statute, the other not. Upon this point the argument on the part of the plaintiff rests upon this, that the debtor must be taken to be cognizant of the state of the balance, and, making a payment without any appropriation, it may reasonably be intended that he meant to act honestly. But it seems to me that we can assume nothing as to the party's knowledge of the state of the balance. It is true the arbitrator finds that a balance was

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due: but it is by no means to be therefore taken that in the defendant's opinion a just debt was due from him upon the old account. Upon the whole, I see no reason for taking the payment as an admission of the old debt.

Third point.

The next question is whether or not the plaintiff had a right to appropriate the payment of the 15*l.* towards the discharge of the earlier part of the account. On the part of the defendant, it was contended, on the authority of *Meggot* v. *Mills* and *Dawe* v. *Holdsworth*, the only cases in our courts that seem to have held the principle of the civil law applicable, that, in the absence of appropriation by either party, the payment is to be ascribed to the debt that is most burthensome to the debtor. It is unnecessary to say, which is the better rule; though I incline to think ours not the most reasonable. It is, however, enough to say, that, notwithstanding the doubt suggested by the Master of the Rolls in *Clayton's* Case, the general current of the authorities tends the other way. I take the law to be settled, that, in default of appropriation by the debtor at the time of making the payment, the creditor has a right to appropriate it. Whether or not that appropriation by the creditor is to be made within a reasonable time, I do not stop to inquire. That suggestion is made in *Simson* v. *Ingham* by Mr. Justice Best; but the rest of the court do not hint at any such limitation. In the present case, however, there has been no unreasonable delay on the part of the creditor in making the appropriation. The plaintiff must have judgment for 15*l.*

ERSKINE, J.—I entirely concur in the opinion that has been pronounced upon both points. With respect to the first, *Tippets* v. *Heane* establishes, that, in order to take a case out of the operation of the statute of limitations by part payment, it must appear to have been the intention of the payer to make the payment on account of the particular debt. The effect of part payment being to shew

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an acknowledgment on the part of the debtor that the debt is a subsisting debt, the intention of the party making the payment, and not that of the party receiving it, is the material thing to be ascertained. In the present case there were two debts, one to which the defendant had no answer, another to which the statute might be set up as a bar. If we ask ourselves what the debtor's intention probably was, the fair inference seems to me to be that he intended to apply the payment to the discharge of that part of the debt for which he might be effectually sued. That seems to be the ground of the decision in *Meggot* v. *Mills* and *Dawe* v. *Holdsworth*, as suggested by Gibbs, C. J., in *Peters* v. *Anderson*. There are circumstances here that would lead to the inference that the defendant intended to apply the payment in part discharge of the more recent debt. But there is no evidence that he did so appropriate it: on the contrary, the arbitrator expressly finds that he did not.—The next question, then, is, whether the creditor, who had the right of appropriation, in the absence of an appropriation by the debtor, has availed himself of that right. It clearly was to his interest to appropriate the 15*l.* to the older debt. On the authority of the cases cited, I am of opinion that we may take it that the plaintiff has appropriated it to the older debt, and therefore that he is entitled to judgment for the 15*l.*

Third point.

Judgment for the plaintiff accordingly.

Friday, May 3rd.

DAVIES *v.* CHAPMAN.

In an action against the marshal for an escape, a plea that the prisoner, before the commencement of the action, voluntarily returned into custody, should aver that he so returned into custody *before the defendant had notice of the escape.*

DEBT against the Marshal of the Marshalsea for freely and voluntarily suffering and permitting one John Noel, a

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prisoner charged in execution at the suit of the plaintiffs for 360*l.*, to escape and go at large.

Plea.

The defendant pleaded, that, after the commitment of Noel to the custody of the defendant in execution, to wit, on &c., Noel wrongfully, privily, and without the knowledge, permission, or consent of the defendant, escaped from and out of the custody of the defendant as such marshal, to places to the defendant unknown; that Noel afterwards, and before the commencement of this suit, to wit, on &c., voluntarily and of his own accord, and without the knowledge of the defendant, returned back again into the custody of the defendant as such marshal; and that the defendant did thereupon then keep and detain, and always from thence hitherto had kept and detained, and before and at the time of the commencement of this suit kept and detained, and still kept and detained the said John Noel in the custody of him the defendant as such marshal, in execution at the suit of the plaintiff under and by virtue of the said commitment in execution—verification.

Special demurrer.

To this plea the plaintiff demurred specially—assigning for cause, that the plea did not state that the defendant had no knowledge, notice, or information of the escape between the time when it took place and when Noel returned back again into the custody of the defendant as marshal; nor did the plea state any excuse or discharge for the defendant's not having during that period made any pursuit for the retaking of Noel, or any excuse for his breach of duty during that period.

The defendant joined in demurrer.

R. V. Richards, in support of the demurrer.—In *Bonafous* v. *Walker*, 2 T. R. 126, it was held that a voluntary return of a prisoner, after an escape, before action brought, is equivalent to a retaking on a fresh pursuit. But there the plea (third) contained a material averment that is wanting here—that, *before the marshal had any notice of*

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the escape, the prisoner returned into custody. If the marshal or the warden have knowledge that the party has escaped, in order to make a voluntary return equivalent to a retaking on a fresh pursuit, there must be some attempt to retake him; otherwise, the offices only being open at certain hours (2 Will. 4, c. 39, s. 18), the debtor may absent himself night after night, with the consent of the marshal or warden, and still they will not be liable to an action, provided the prisoner returns into custody before the opening of the offices. The defendant should by his plea shew that he is free from all blame. In *Griffiths* v. *Eyles*, 1 B. & P. 413, the plea also contained an averment that the prisoner returned into custody *before the warden knew of the escape*. The like averment will be found in the precedent in 3 Chitty on Pleading, 6th edit., 844, 5: and it is the common and ordinary form. And see *Rigeway's* Case, 3 Rep. 52. a.

Hoggins, in support of his plea.—The plea pursues the common form. The cases establish that a return of the prisoner into custody, without any default on the part of the marshal or warden, though he may know of the escape, is an answer to the action. In *Chambers* v. *Gambier*, Comyns, 544, the plea was, that the prisoner, without the knowledge of the defendant, escaped, and before the action was brought, without the knowledge of the defendant, returned: and the defendant had judgment—"for, this is tantamount to a retaking on a fresh pursuit." [*Tindal*, C. J.—Knowing that the prisoner has escaped, is the marshal to do nothing] If he knew where the prisoner was, he was bound to retake him: but the plea alleges that he escaped *to places to the defendant unknown*. It is enough if the marshal is shewn to have been guilty of no default. The escape in law pervades the whole time of the party's absence from custody: it was not requisite that the plea should allege that the party returned into custody

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before the marshal had notice of the escape (107). If the court entertain any doubt, the defendant prays leave to amend.

TINDAL, C. J.—The court entertain no doubt whatever. The plea may be amended on the usual terms.

Rule accordingly.

(107) *Hoggins* also cited Chambers v. Jones, 11 East, 406; but there the plea contained the allegation that was wanting here—that the prisoner returned *before the defendant had notice of the escape.*

EASTMURE *v.* LAWS.

Friday, May 3rd.

Where a verdict passes against a defendant upon a plea of set-off, he is estopped from setting up the same demand in a fresh action.

DEBT for 30*l.*, money had and received by the defendant to the use of the plaintiff, and for the like sum alleged to be due from the defendant to the plaintiff on an account stated between them.

Plea—as to the causes of action in the first count of the declaration mentioned—that the plaintiff ought not to be admitted to say that she, the defendant, was indebted to him upon the said causes of action therein mentioned, because she said that theretofore, and before the commencement of the suit, to wit, on the 23rd September, 1837, she, the defendant, impleaded the plaintiff in an action on promises, in her majesty's court of Exchequer of Pleas at Westminster, and afterwards, to wit, on the 24th October, 1837, she declared in the said action, and in her declaration, the defendant, according to the course and practice of the said court of Exchequer of Pleas, therein complained that the plaintiff was indebted to her, the now defendant, in the respective sums of 200*l.* and 200*l.* and 200*l.* and 200*l.*, for and upon the considerations therein mentioned: And the defendant further said, that, afterwards, to wit, on the 8th November, 1837, the now plaintiff, by his attor-

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ney, amongst other pleas, pleaded in the said action, as to the said causes of action in the said declaration mentioned, except 50*l.*, part thereof, that the now defendant, before and at the time of the commencement of the said action in the said court of Exchequer of Pleas, and at the time of pleading the said pleas, was indebted to the now plaintiff in 250*l.* for money had and received by the now defendant for the use of the now plaintiff, and that he, the now plaintiff, was ready and willing, and he did by his said plea offer to set off and allow to the now defendant out of the said last mentioned sum of money the full amount of her damages in the said action; part of which said last mentioned sum of money so pleaded in the said action by the now plaintiff by way of set-off, was the identical sum of money in the said now plaintiff's declaration mentioned, and for which the now plaintiff hath impleaded the defendant: And the defendant further said, that, afterwards, to wit, on the 13th November, 1837, the now defendant, by way of replication to the said plea of set-off of the now plaintiff, replied that she, the now defendant, was not indebted to the now plaintiff in manner and form as the now plaintiff in his said plea of set-off alleged; and thereupon issue was joined between the said parties; and such proceedings were thereupon, afterwards, to wit, on the 29th November, 1837, had, that the jurors of the jury, being summoned in the said action, and having come to speak the truth of the matters in issue in the said action, and being chosen, tried, and sworn, did, as to the said issue upon the said plea of set-off, say upon their oath that the said now defendant was not indebted to the said now plaintiff in manner and form as the now plaintiff in his said plea of set-off alleged; and afterwards, to wit, in Hilary Term, 1838, the said now defendant, by the consideration and judgment of the said court, recovered in the said action against the now plaintiff 97*l.* 8*s.* for her damages which she had sustained, as well on occasion of the not performing of the said promises in

her, the said now defendant's, declaration mentioned, as for her costs and charges by her in that behalf expended, whereof the now plaintiff was convicted—prout patet &c.; which said judgment still remains in full force and effect, not in the least reversed or made void: And this the defendant is ready to verify by the said record; wherefore she prays judgment if the plaintiff ought to be admitted to say that the said now defendant is indebted to him upon the consideration and causes of action in the first count of the declaration mentioned.

Replication.

The plaintiff replied—That he ought to be admitted to say that the defendant was indebted to him upon the said causes of action in the first count of the declaration mentioned, because he said, that, although true it was that the defendant impleaded him, the now plaintiff, in the said action in the plea mentioned in manner and form as was therein set forth, and that he, the now plaintiff, did in the said action plead (amongst other pleas) that she was indebted to him in the said several sums of money therein mentioned, and that he was ready and willing and did by his said plea offer to set off and allow to her out of those sums of money the full amount of her damages in the said action, and that part of the said sum of money so pleaded in the said action by way of set-off *was the identical sum of money in the said now plaintiff's declaration mentioned,* and for which he had impleaded the defendant; and although true it was that the now defendant did reply to the said plea of the now plaintiff as in the plea of the now defendant is alleged, and that the jurors of the jury summoned in the said action did say as to the said issue upon the said plea of set-off, that the said now defendant was not indebted to the said now plaintiff in manner and form as in the said plea of set-off was alleged; yet the plaintiff said that the said jurors of the jury aforesaid did so say because he, the now plaintiff, did not, at the trial of the said action, give or offer to the jurors of the jury aforesaid any evidence

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whatever in support of his said plea of set-off, nor was prepared, nor did he seek at the said trial to substantiate or in any way to sustain the said plea, or to prove that the said several sums of money therein mentioned were due and owing by the said now defendant to him, the now plaintiff, as was in that plea alleged: nevertheless the plaintiff said that those several sums of money were at the time of the said trial and still were, and each of them was, due and owing to him from the defendant, and had never been in any way paid, satisfied, and discharged: and this the plaintiff was ready to verify; wherefore the said plaintiff said that he ought to be admitted to say that the defendant was indebted to him upon the consideration and causes of action in the first count of the declaration mentioned; and he prayed judgment, and his debt aforesaid, together with his damages by him sustained on occasion of the detention thereof, to be adjudged to him &c.

Special demurrer.

To this replication the defendant demurred specially—assigning for causes—that the matters alleged in the replication did not confess and avoid the plea, nor prevent the estoppel which the defendant had pleaded; and that the matters pleaded, if true, would be only an equitable, and not a legal answer to the plea, and formed only a ground for an application by motion to the court of Exchequer for its interference to prevent any injustice by reason of the law of estoppel, either by ordering the said plea of set-off, and the issue thereon, and the said verdict of the jury, to be taken off the record, or by such other means as might appear just under the special circumstances.

The plaintiff joined in demurrer.

Theobald, in support of the demurrer.—This action is brought for the recovery of a debt that was the subject-matter of a set-off in a former action. In that action issue was taken upon the alleged set-off; the verdict obtained

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by the plaintiff upon that issue is now pleaded by way of estoppel; and the replication (which is demurred to) in substance is, that the present plaintiff failed in establishing his set-off upon the former occasion, because he offered no evidence. In Comyns's Digest, *Estoppel*, (E.), are collected all the cases in which a verdict does not operate an estoppel; and this is not found amongst them. The inconvenience of this course is manifest. [*Tindal*, C. J.—The defendant is in effect attempting to make a verdict and judgment against him equivalent to a nonsuit.] The plea of set-off is a statutory plea of payment. If the verdict in the former action had passed upon a plea of payment, could the defendant re-agitate the matter in a fresh action? *Marriott* v. *Hampton*, 7 T. R. 269, is very much in point: it was there held, that, where money has been paid by the plaintiff to the defendant under the compulsion of legal process, which is afterwards discovered not to have been due, the plaintiff cannot recover it back in an action for money had and received: and Lord Kenyon said: "If this action could be maintained, I know not what cause of action could ever be at rest. After a recovery by process of law, there must be an end of litigation, otherwise there would be no security for any person. I cannot therefore consent even to grant a rule to shew cause, lest it should seem to imply a doubt. It often happens that new trials are applied for on the ground of evidence supposed to have been discovered after the trial; and they are as often refused: but this goes much further." And Grose, J., said: "It would tend to encourage the greatest negligence if we were to open a door to parties to try their causes again because they were not properly prepared the first time with their evidence." The authority of *Marriott* v. *Hampton* has been confirmed in many subsequent cases: among others in *Hamlet* v. *Richardson*, 2 M. & Scott, 811, 9 Bing. 644. It is consistent with this replication that the jury may have had evidence before them to negative the claim

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of set-off. Besides, the plaintiff might have withdrawn his plea.

C. Jones, contrà.—The present plaintiff being unprepared to support his plea of set-off in the former action, a verdict necessarily followed for the then plaintiff upon that issue: and the defendant could only assert his right by bringing a second action. If the former verdict is to operate an estoppel, the defendant will be deprived of an advantage he would have had if he had been plaintiff, viz. that of electing to be nonsuited, or withdrawing the record, if unprepared to support his claim; in which case he might bring another action when better prepared. [*Tindal*, C. J.—What was there to prevent the plaintiff from going before a judge for the purpose of withdrawing his plea in the former action?] To entitle him to a verdict upon a plea of set-off, the defendant must prove a demand exceeding that of the plaintiff: therefore the verdict cannot operate as an estoppel. [*Tindal*, C. J.—In *Cousins* v. *Paddon*, 2 C. M. & R. 547, 5 Tyr. 535, 4 Dowl. 488, the issue on the plea of set-off was held susceptible of a distributive finding.] That case is not reconcileable with *Moore* v. *Butlin*, 2 N. & P. 436, 7 Ad. & E. 595. [*Bosanquet*, J., referred to *Laing* v. *Chatham*, 1 Camp. 252. That was an action of assumpsit for goods sold and delivered. The defendant had pleaded the general issue and given a notice of set-off; but did not appear at the trial. Garrow, for the plaintiff, having proved his case, observed he was at a loss for what sum to take the verdict. He allowed the defendant had a cross demand to a certain amount against the plaintiff; but he was afraid that if a deduction for this should be made from the damages he was strictly entitled to, the defendant would notwithstanding bring another action for the same cause. He therefore prayed that there might be a special indorsement on the postea to shew afterwards on what principle the verdict had proceeded.

Lord Ellenborough said such an indorsement should be made, and the plaintiff might either take the larger sum, subject to be reduced, on the defendant's entering into a rule to bring no action for the set-off; or for the smaller sum, deducting the set-off then: after which, if the defendant should bring another action, the special indorsement on the postea would be a ground for the court to stay proceedings in it. And ultimately a conditional verdict was taken for the whole debt proved to be due to the plaintiff, and an indorsement made on the postea, to let in the defendant upon the above terms to reduce it to the sum actually due on a balance of accounts between them.] In *Ravee* v. *Farmer*, 4 T. R. 146, it was held that an award made upon a reference of *all matters in difference* between the parties, does not preclude the plaintiff from suing upon a cause of action subsisting against the defendant at the time of the reference, upon proof that the subject-matter of such action was not laid before the arbitrators nor included in the matters referred. [*Tindal*, C. J.—Whatever may be the intrinsic worth of that case, it stands clear of the difficulty as to estoppel.] The claim for which this action is brought cannot be said to have been a matter in difference in the former action. [*Bosanquet*, J.—In *Hennell* v. *Fairlamb*, 3 Esp. 104, it was held that a party cannot bring an action for what has been the subject of a set-off in a former action by the defendant against him; but, if the set-off was more than sufficient to cover the demand in the former action, he may maintain an action for the surplus.] In *Seddon* v. *Tutop*, 1 Esp. 401, where the plaintiff had judgment by default in an action upon a bill of exchange, and also for goods sold and delivered, and by mistake took a verdict only for one of the demands, he was afterwards permitted to maintain an action for the other. Lord Kenyon there said: "In this case, the justice of the case corresponds with the law. It is admitted that 76*l.* was due from the defendant to the plaintiff, and that 51*l.*

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has been recovered. Where a man brings an action, it must be presumed that it is for the whole of his demand; but it is not conclusive; he may shew that in point of fact he did in such action go to recover part of his demand only. He may also shew that he did not under the first action before the jury go into any evidence of that demand which is the object of the second action; for, if he did, and failed, it would be conclusive. I am therefore of opinion that it is competent for the plaintiff now to shew that no part of the present demand was included in the former verdict." And that ruling was afterwards confirmed by the court—6 T. R. 607. [*Erskine*, J.—Lord Kenyon there puts it upon the form of the issue—he says: " By attending to the pleadings in this action it will also be found that the plaintiffs are right in point of form. The issue was, whether the damages demanded in this action have been already satisfied by the recovery in the former action; and most clearly they have not."] In *Lord Bagot* v. *Williams*, 5 D. & R. 87, 3 B. & C. 235, where the plaintiff sued his steward in an inferior court for 4,000*l.*, which was a sum less than he knew to be due to him upon the final investigation of the defendant's accounts, and upon judgment by default verified for 3,400*l.* only: it was held, upon a plea of judgment recovered in answer to a second action in this court for the balance due, that the plaintiff was concluded by the action brought in the inferior court. In *Hadley* v. *Green*, 2 C. & J. 374, 2 Tyr. 390, a landlord sued his tenant for rent, and on the money counts, and gave particulars on the count for money had and received for a quantity of stone quarried and carried away by the defendant: at the trial he took a general verdict, but for the amount of the rent only, and brought another action against the defendant in case for quarrying and carrying away the stone, and, a few days before the trial of the first action, delivered a particular in the second action for the same stone, exactly corresponding with the particular

delivered on the count for money had and received in the first action: and it was held that the recovery in the first action was no bar to the plaintiff's recovering in the second. So, in *Heming* v. *Wilton*, 5 C. & P. 54, in an action upon an attorney's bill, the plaintiff having only recovered a small sum for money lent, no signed bill having been delivered, it was held that he was not estopped from recovering the amount of the bill in a second action; and that it was not necessary that he should have been nonsuited in the first action, to entitle him to bring the second. In *Godson* v. *Smith*, 2 Moore, 157, an action of assumpsit being improperly brought against an administratrix, she pleaded in abatement that others were jointly liable, which she failed to prove, in consequence of which the plaintiff had a verdict with 1*s*. damages: it was held that such verdict did not amount to satisfaction, so as to bar the plaintiff from recovering against the other contractors. And in *Thorpe* v. *Cooper*, 2 M. & P. 245, 5 Bing. 116, Best, C. J., delivering the judgment of the court of error, says: "If an award goes beyond the submission to the arbitrators, it is pro tanto void. If it omits to decide on any thing within the scope of the submission, the interest of the parties remains in the state in which it was before the award was made. In *Ravee* v. *Farmer*, 4 T. R. 146, the reference was 'of all matters in difference:' it was held by the court of King's Bench that the parties might, after an award made on this submission, shew that there were matters which, not being brought under the consideration of the arbitrators, were not decided by them, and were therefore not affected by the award. Indeed, this rule is not confined to awards; for, although a declaration contains counts under which the plaintiff's entire demand might be recovered, yet, if no attempt has been made to give evidence of some of the claims, they may be recovered in another action. This was decided in *Seddon* v. *Tutop*, 6 T. R. 607, 1 Esp. 401; and that decision has been con-

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firmed by subsequent cases in the King's Bench and Common Pleas." [*Tindal*, C. J.—A defendant must not be permitted to take his chance of a verdict on a plea of set-off, and, failing, being a second action.]

Theobald, in reply.—In *Seddon* v. *Tutop*, a distinct issue was taken upon the identity of the two causes of action: here the second action is admitted to be brought for the same cause which formed the subject-matter of the set-off in the first action. In *Hadley* v. *Green*, the first action was *debt*, the second *case*; therefore there could be no estoppel: but here the verdict and judgment will be for the same identical causes of action. The courts hold a much more strict doctrine at the present day than prevailed at the time *Ravee* v. *Farmer* was decided: and that case is in effect over-ruled by *Dunn* v. *Murray*, 4 M. & R. 571, 9 B. & C. 780, where it was held, that, where all matters in difference in a cause are referred, and the arbitrator awards to the plaintiff a sum in satisfaction of his damages in the cause, the plaintiff cannot afterwards support another action for a demand within the scope of the reference, and which he might have brought before the arbitrator. Lord Tenterden there says: "It is certain that the present claim *might* have been brought before the arbitrator upon the former occasion; and in the case of *Smith* v. *Johnson*, 15 East, 215, Lord Ellenborough lays it down, that, where all matters in difference are referred, the party, as to every matter included within the scope of such reference, ought to come forward with the whole of his case. So, here, the present claim was within the scope of the former reference, for it arose out of the dismissal; it was the duty of the plaintiff to bring it before the arbitrator, if he meant to insist on it as a matter in difference; and, not having done so, he cannot now make it the subject-matter of a fresh action." Here, nothing but his own laches prevented the present plaintiff from bringing forward evidence to support

his set-off in the former action. As to the alleged hardship, it is purely optional for a defendant to plead a set-off. The plea might have been withdrawn at any time, even at the trial: and the court would have applied the proper remedy, if there existed any equitable ground for preventing the estoppel from taking effect.

TINDAL, C. J.—I am of opinion that this is a good plea, and that the replication is no answer to it. The action is debt for money had and received, money paid, and money found due upon an account stated; to which the defendant pleads, that, before the commencement of this suit, he impleaded the now plaintiff in the court of Exchequer in an action on promises; that the now plaintiff pleaded in that action, amongst other pleas, that the now defendant, before and at the time of the commencement of the said action, and at the time of pleading the said plea, was indebted to the now plaintiff in 250*l.* for money had and received by the now defendant for the use of the now plaintiff; and that the now plaintiff was ready and willing and did by his said plea offer to set off and allow to the now defendant out of that sum the full amount of her damages in the said action; part of which last-mentioned sum of money so pleaded in the said action by the now plaintiff by way of set-off was the identical sum of money in the now plaintiff's declaration, and for which the now plaintiff had impleaded the now defendant. The plea then goes on to state that issue was joined upon the plea of set-off in such former action, and that such issue went to the jury, and a verdict was thereupon found for the then plaintiff, the now defendant. The question is, whether, after a precise issue joined between the parties, and found against the defendant, the latter is at liberty to re-agitate the same identical point in a new action. Had the present plaintiff been the plaintiff in the former action, and elected to go to the jury, it is perfectly clear that he never could have

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brought the matter in question again, on the ground that he had offered no evidence to substantiate his claim. The answer would be, that he might have been nonsuited, and so have relieved himself from the estoppel. It is said, that, to hold a defendant concluded by the verdict upon a plea of set-off, operates a great hardship, seeing that he has not the means of curing any defect in his evidence, as the plaintiff may, by suffering himself to be called. That is true; but then the defendant, it is to be recollected, is not bound to put a plea of set-off upon the record: and, when he has done so, if before the trial he finds that he is unable to sustain his plea, he may withdraw it on payment of costs: even upon application to the judge in court, I feel little doubt that the issue might be withdrawn from the consideration of the jury. A second hardship that is suggested is, that, to entitle him to a verdict upon a plea of set-off, the defendant is bound to shew that the debt due to him equals or exceeds the plaintiff's demand against him. The answer to that is, that, although the verdict is found against him, he still has the full benefit of his plea by the allowance of all that is proved to be due to him—*Moore Butlin*, 2 N. & P. 436, 7 Ad. & E. 495. I am unable to see how, consistently with the doctrine so learnedly enforced by Lord Ellenborough in the case of *Outram* v. *Morewood*, 3 East, 346, an estoppel can be avoided by matter in pais and in the breast of the party himself.

BOSANQUET, J.—I am also of opinion that the plea in question is well pleaded. I have always understood, that, when an issue is joined upon a specific point, a verdict and judgment upon that issue are conclusive between the parties, and may be pleaded by way of estoppel. That is precisely the case here: it is admitted upon the record that the subject-matter of the set-off in the former action is identically the same as that which is in controversy upon the present occasion. The hardship suggested—that the

defendant cannot have a nonsuit upon his plea of set-off—undoubtedly may operate in some cases. But the defendant is not compelled to plead a set-off. The plea of set-off is put upon the record as an answer to the whole action. The court of King's Bench certainly have held, that, notwithstanding the defendant establishes his set-off to a certain extent, yet, if it does not go to the full amount of the plaintiff's demand, the plaintiff must have the verdict upon that issue: but the defendant has all the benefit of his set-off to the extent of his proof. The pleading a set-off or not, is a matter that is entirely in the defendant's own discretion: if he pleads it, he must abide the consequences. If he is in any difficulty, he has abundant opportunity to relieve himself from it: even at the latest hour, he may apply to the judge, as suggested by his Lordship—probably even while the trial is going on.

COLTMAN, J.—I am of the same opinion. The result of *Outram* v. *Morewood* is this, that, if a verdict be found upon a fact that is distinctly put in issue, such verdict may be pleaded by way of estoppel in another action between the same parties in respect of the same fact. Here, the matter now sought to be put in issue by the plaintiff is the same identical matter that was in issue in the former action. The effect of a replication of nil debet to a plea of set-off, is precisely the same as that of a plea of nil debet to a declaration: if any thing is proved to be due upon the set-off, it is allowed in the way of deduction from the damages. Perhaps it might be more proper that there should in such case be a special finding, that, as to so much, the set-off is proved, and as to the residue a verdict for the plaintiff: and this may account for the decision in *Cousins* v. *Paddon*, 2 C. M. & R. 547, 5 Tyr. 535, 4 Dowl. 488. The matter in issue is, whether the whole or any part of the alleged set-off is due.

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ERSKINE, J.—The replication in this case admitting the identity of the present cause of action with the claim which was the subject of the set-off in the former action, it appears to me that the plea is a good bar, and that the replication affords no answer to it.

Judgment for the defendant (108).

(108) See Stafford v. Clarke, 9 Moore, 724, 2 Bing. 377, 2 C. & P. 403, where it was held that a judgment recovered for the same cause of action, and between the same parties, may be given in evidence in assumpsit under the general issue: if it be pleaded, it operates as a bar; if not, it is admissible, though not conclusive.

Saturday, May 4th.

Bankruptcy of a sole plaintiff after the cause of action accrued and before the commencement of the suit, is an issuable plea.

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THIS was an action of indebitatus assumpsit for goods sold and delivered. The defendant, being under terms to plead issuably, by leave of Coltman, J., pleaded non assumpsit, and the bankruptcy of the plaintiff after the cause of action accrued and before the commencement of the action. The plaintiff, conceiving the second not to be an issuable plea, signed judgment.

Hayes, on a former day in this term, moved for a rule nisi to set aside this judgment for irregularity.—The plea in question clearly is an issuable plea: it goes to the merits of the action; shewing that all the rights of the plaintiff are vested in his assignee, who alone can put the law in motion to enforce them—6 Geo. 4, c. 16, s. 63. A recovery by the plaintiff in this action would be no answer to a future action for the same demand at the suit of the assignee. *Staples* v. *Holdsworth*, 4 New Cases, 144, 5 Scott, 432, is distinguishable: there, the plea sought to be pleaded was, the bankruptcy of *one* of the plaintiffs; it

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was like a plea in abatement, of non-joinder; the merits of the action might there have been decided with safety to the defendant.—He produced an affidavit stating that application had been made to the assignee, who averred that the action was brought without his concurrence. [*Tindal*, C. J., referred to *Wettenhall* v. *Graham*, 6 Scott, 603, 4 New Cases, 714, where it was held that a defendant who is under terms to plead issuably cannot plead that the plaintiff has been discharged under the insolvent debtors act, and that the cause of action has passed to his assignees.] A rule nisi having been granted—

Wilde, Serjeant, now shewed cause, upon an affidavit which stated that the plaintiff before his bankruptcy had assigned the debt for which this action was brought to a person who was named, that the debt in question was not inserted in the bankrupt's schedule, that the plaintiff had obtained his certificate, that the person to whom the debt was assigned had died, and that the plaintiff was his executor, and was suing for the benefit of the estate of the deceased.—If a defendant, being under terms to plead issuably, plead several pleas, one of which is not issuable, the plaintiff may sign judgment as for want of a plea, though the others are issuable pleas—*Waterfall* v. *Glode*, 3 T. R. 305; *Serle* v. *Bradshaw*, 2 C. & M. 148, 4 Tyr. 69, 2 Dowl. 289. And *Staples* v. *Holdsworth* and *Wettenhall* v. *Graham* are distinct authorities to shew that the bankruptcy or insolvency of the plaintiff is not an issuable plea.

Hayes, in support of his rule.—*Staples* v. *Holdsworth* and *Wettenhall* v. *Graham* are not applicable here. This is the case of a *sole* plaintiff becoming bankrupt after the cause of action accrued and *before* the commencement of the action, the cause of action being one that passed to his assignee: *Staples* v. *Holdsworth* was the case of a plea of

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bankruptcy of *one* of two plaintiffs *after* the commencement of the action; and the ground of that decision appears from the following passage of the judgment of the court delivered by the Lord Chief Justice: "It is obvious that the substantial merits of the controversy between these parties may be tried as well in the present action as in one to be brought by the solvent plaintiff and the assignees of the bankrupt against the present defendant. And it appears to us that no injury can result to the defendant from his being compelled to try the question of his liability in the present form of action; for, if the plaintiffs should recover against him, and receive satisfaction, the present defendant can never be compelled to pay the money over again. Or, if we put the case the other way, and suppose the defendant to succeed in the present action, and obtain a judgment on a plea which goes to the merits, we are of opinion that in that case also the judgment would be a bar to any subsequent action which should be brought by the solvent plaintiff in conjunction with the assignees of the bankrupt." Suppose here a second action brought by the assignee, would a judgment for the plaintiff in this case affect his right to sue? In *Wettenhall* v. *Graham*, the cause of action was one that did not pass to the assignee—*Clark* v. *Calvert*, 8 Taunt. 742. Then, the fact of the debt for which this action is brought having been assigned previously to the bankruptcy, though it may afford very good matter for a replication, is clearly no argument to shew that the bankruptcy of the plaintiff is not primâ facie an issuable plea: nor would a disclaimer on the part of the assignee preclude him from hereafter suing.

TINDAL, C. J.—It appears to me that this case is distinguishable from *Staples* v. *Holdsworth*; there the bankruptcy took place *after* the commencement of the action—and of *one* of the plaintiffs only: here, there is only one plaintiff, and his bankruptcy took place *before* the com-

mencement of the action. I think the rule for setting aside the judgment must be made absolute.

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BOSANQUET, J.—I am of the same opinion. The only question is whether or not the plea is upon the face of it an issuable plea. We cannot by reason of that which is stated in the plaintiff's affidavit hold that it is not.

The rest of the court concurring—

Rule absolute (109).

(109) The court seem to have abandoned the case of Wettenhall v. Graham, 6 Scott, 603, 4 New Cases. 714, as untenable.

OSBORNE *v.* PECHELL and Others.
HEARSAY *v.* SAME.

Monday, May 6th.

IN the year 1817, the plaintiffs in these two actions were placed by the overseers of Ambersham South in certain cottages which were used as a poor-house. In 1836, the premises were sold by order of the poor law commissioners; and one Hollis became the purchaser. The plaintiffs refusing to quit, warrants were granted by certain magistrates, under the 59 Geo. 3, c. 12, s. 24 (110), to enable the

In an action by a pauper to try the right to property claimed by him, the court refused to stay the proceedings until security for costs was given by a third party who had actively countenanced them, it not appearing that the action would not have been brought but for the assistand instigation of such third party.

(110) Which, reciting that difficulties had frequently arisen and considerable expenses had sometimes been incurred, by reason of the refusal of persons who had been permitted to occupy, and who had intruded themselves into parish or town houses, or other tenements or dwellings built or provided for the habitation of the poor, or otherwise belonging to such parishes, to deliver up the possession of such houses, tenements, or dwellings, when thereto required; and that it was expedient to provide a remedy for the same—enacts, "that, if any person who shall have been permitted to occupy any parish or town house, or any other tenement or dwelling belonging to or pro-

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parish officers to give possession to the purchaser. These actions were brought against the magistrates signing the warrants, and against the constables who executed them. The plaintiff Hearsay claimed to be entitled to the property, his father having been in possession of it without acknowledgment of any kind since the year 1774. Upon an affidavit of these facts, and setting forth certain letters that had been addressed by one Wood to the parish officers, in one of which he said—"I will not shrink from any step I may have taken in the affair [he had previously petitioned the House of Lords upon the subject], and, while trial by jury exists, I fear no one; and, if personally insulted, will spare no expense in my defence; the cause I have considered a public, not a private one"—and in another—"If you will send the title-deeds of the cottage, or

vided by or at the charge of any parish, for the habitation of the poor thereof, or who shall have unlawfully intruded himself or herself into any such house, tenement, or dwelling, or into any house, tenement, or hereditament belonging to such parish, shall refuse or neglect to quit the same, and deliver up the possession thereof to the churchwardens and overseers of the poor of any such parish, within one month after notice and demand in writing for that purpose, signed by such churchwardens and overseers, or the major part of them, shall have been delivered to the person in possession, or, in his or her absence, affixed on some notorious part of the premises, it shall be lawful for any two of his majesty's justices of the peace, upon complaint to them made by one or more of the churchwardens and overseers of the poor of the parish in which any such house, tenement, or dwelling shall be situated, to issue their summons to the person against whom such complaint shall be made, to appear before such justices at a time and place to be appointed by them, and to cause a summons to be delivered to the party against whom the complaint shall be made, or, in his or her absence, to be affixed on the premises, seven days at the least before the time appointed for hearing such complaint; and such justices are hereby impowered and required, upon the appearance of the defendant, or upon proof on oath that such summons hath been delivered or affixed as is hereby directed, to proceed to hear and determine the matter of such complaint, and, if they shall find and adjudge the same to be true, then by warrant under their hands and seals to cause possession of the premises in question to be delivered to the churchwardens and overseers of the poor of the parish, or to some of them."

prove to the satisfaction of Mr. R. that the property belongs to the parish, Hearsay will give no further trouble:" and stating that the plaintiffs had been sent by Wood to Mr. R., the attorney who conducted the causes; and other similar acts to shew that the plaintiffs were acting under the advice and with the assistance of Wood—

Wilde, Serjeant, on a former day in this term obtained a rule calling upon the plaintiffs and upon Wood to shew cause why the proceedings should not be stayed until they or Wood should give security for costs.—He cited *Tenant* v. *Brown*, 5 B. & C. 208, where, in trespass against parish officers for distraining for poor-rates, it appearing that the plaintiff refused to pay the rates by the desire of his landlord, who was also the attorney in the cause, the court stayed proceedings until he gave security for costs.

Erle and *Knowles* now shewed cause, upon affidavits setting forth the nature of Hearsay's claim to the premises, and stating that Mr. R. was not and never had been Wood's attorney, but that, on the contrary, Wood had never seen him until after the commencement of the actions.—Poverty is no ground for calling upon a plaintiff to give security for costs—*M'Cullock* v. *Robinson*, 2 N. R. 352; *Morgan* v. *Evans*, 7 Moore, 344. And there can be no pretence for calling upon Mr. Wood to give security, merely on the ground that, compassionating these poor people, whom he thinks (perhaps erroneously) have been made victims of oppression, he evinces some warmth of feeling in their behalf. In *Doe* d. *Selby* v. *Alston*, 1 T. R. 491, Buller, J., says: "There are only three instances in which the court will interfere on behalf of a defendant, to oblige the plaintiff to give security for costs; the first is, when an infant sues, the court will oblige the prochein amy or guardian, or attorney, to give security for the costs; secondly, when the plaintiff resides abroad, in which case

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the court will stay the proceedings till security is given for the costs; and thirdly, where there has been a former ejectment; but there the rule is, to stay the proceedings in the second ejectment, till the costs of the former are paid, and not till security is given for the costs of the second (111). In *Tenant* v. *Brown*, the circumstances were very peculiar; the landlord who was also the plaintiff's attorney, had indemnified him.

Wilde, Serjeant, in support of his rule.—The simple question is, whether it is not sufficiently apparent from all the circumstances, and particularly from the letters that are set forth in the defendants' affidavit, that these actions are substantially carried on by Mr. Wood, and at his expense, or upon his indemnity.

TINDAL, C. J.—We are not called upon to decide whether the cottages in question are the property of Hearsay or of the parish officers. Whatever opinion we may feel inclined to form from the statement in the affidavits, still the plaintiffs have a right to go before a jury unprejudiced by anything that may fall from us. The real question here is, whether these actions are virtually and substantially the plaintiffs' actions or Wood's. If Wood were shewn to be interested in the result, or it appeared that the actions would not have been brought but for his instigation and countenance, then it would be but just and right that he should give the security required. The case would then fall within the principle of *Tenant* v. *Brown*, where the action being really brought for the benefit of the landlord, the court compelled him to give security for the costs; and also within another case which I remember to have been decided in the court of King's Bench, where a man having put forth his servant as the nominal plaintiff, himself being

(111) See Doe d. Carr v. Jordan, 4 Scott, 370.

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the real plaintiff, the court made him pay the costs of the action. Here, however, it has not been proved to my satisfaction that the plaintiffs would not have brought these actions, but for Wood's instigation and assistance. There are certainly expressions in that gentleman's letters that are sufficient to justify the present application; but I think the suggestion of their being in fact Wood's actions is answered by the affidavits on the other side. The rule therefore must be discharged; and, as far as Wood is concerned, without costs.

The rest of the court concurred, COLTMAN, J., thinking that the rule ought to be discharged with costs; but ultimately the rule was made absolute without costs as against Wood, as to the rest, the costs to be costs in the cause.

Rule accordingly (112).

(112) In *The King* v. *Wakelin*, 1 B. & Ad. 50, it was held that it is no objection to the granting of an information in the nature of quo warranto, that the person applying is in low and indigent circumstances, and that there is strong ground of suspicion that he is applying not on his own account or at his own expense, but in collusion with a stranger: but the court required security for costs.

SILVERSIDE *v.* TAPPEN.

Tuesday, May 7th.

It is not necessary where a delaration is *filed*, to indorse on it the time for pleading.

HEATON, on a former day, obtained a rule calling upon the plaintiff to shew cause why the declaration *filed* in this case should not be set aside for irregularity, the same bearing no indorsement of the time for pleading.—He cited Tidd's Practice, 9th edit. 473, Archbold's Practice, 6th edit. 299, and *Heath* v. *Rose*, 2 New Rep. 223.

Petersdorff shewed cause.—In *Heath* v. *Rose*, the application was, to set aside a judgment signed for want of a plea. It may be, that, in the absence of a notice to plead, the

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plaintiff cannot sign judgment for want of a plea; but the want of a notice is no ground for setting aside the declaration—*Anonymous*, 3 Wils. 137.

TINDAL, C. J.—In *Heath* v. *Rose*, the declaration was *delivered* (113): according to the practice of the court, as reported to us by our officers, it is not necessary, where the declaration is *filed*, to indorse on it the time for pleading.

The rest of the court concurring—

Rule discharged, with costs.

(113) So it was in the case in 3 Wilson. The reason why the time for pleading need not be indorsed where the declaration is *filed*, is, that the notice to plead is contained in the notice of filing the declaration.

Tuesday, May 7th.

EDWARDS *v.* GREENWOOD.

To an action by an indorsee against the maker of a promissory note, the defendant pleaded, that, after the making of the note, the plaintiff drew a bill on the defendant for a certain sum, which, after the defendant had accepted it, the plaintiff took in satisfaction of the promissory note, and indorsed it to persons unknown to the defendant: the plaintiff replied that he did not draw such bill, nor did the defendant accept it, nor did he, the plaintiff, take it in satisfaction of the promissory note: the defendant demurred to this replication for multifariousness. A judge at chambers having, upon an affidavit that the plea was false, made an order for setting aside the demurrer as frivolous—the court rescinded the order.

TO a count in assumpsit by an indorsee against the maker of a promissory note, the defendant pleaded, that, after the making of the note, the plaintiff drew a bill on him for 60*l*., which, after the defendant had accepted it, the plaintiff took in satisfaction of the promissory note, and indorsed it to persons unknown to the defendant.

The plaintiff replied that he did not draw any such bill as in the plea alleged, nor did the defendant accept such bill, nor did the plaintiff take it in satisfaction of the note.

The defendant demurred specially to this replication, on the ground of multifariousness and complexity.

Upon application to Vaughan, J., at chambers, with an affidavit that the plea was totally false, the plaintiff obtained an order for setting aside the demurrer as frivolous.

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Hurlstone, on a former day in this term, moved to rescind this order.—The replication is not upon the face of it so good as to warrant the learned judge in setting aside the demurrer as frivolous. In *Crisp* v. *Griffiths*, 2 C. M. & R. 159, where a similar plea was pleaded, the court of Exchequer held the plea bad because it did not aver that the bill was *given* as well as *taken* in satisfaction of the note; but they declined to give any opinion as to whether the matter of the plea was well put in issue by the replication de injuriâ; which was treated by the court as an important point. The replication in the present case is in effect a replication de injuriâ; and it is quite clear that such a replication can only be pleaded in answer to a plea consisting merely of matters of excuse—*Crogate's* Case, 8 Rep. 132; *Selby* v. *Bardons*, 3 B. & Ad. 2; *Bardons* v. *Selby*, 3 M. & Scott, 280, 9 Bing. 756: *Griffin* v. *Yates*, 2 New Cases, 579, 2 Scott, 845. In *Poole* v. *Salter*, 2 C. & J. 85, 1 Dowl. 297, 2 Tyr. 139, 1 Price's C. P. 156, the court refused to set aside a plea of judgment recovered, on an affidavit of its being totally false, though there did not remain time for the plaintiff to get judgment in the term, he having neglected to take the regular steps for that purpose in the earlier part of the term.

Petersdorff shewed cause.—The replication is in effect a general traverse of the plea: the whole amounts to a single and simple proposition. In *Webb* v. *Weatherby*, 1 Scott, 477, 1 New Cases, 502, where to a declaration in assumpsit by the assignee of an insolvent debtor, for goods sold &c., the defendant pleaded that he paid a certain sum in full satisfaction and discharge of the promise in the declaration, and that the insolvent accepted and received the same in full satisfaction and discharge; the plaintiff replied that the defendant did not pay the insolvent the sum mentioned in full satisfaction and discharge, nor did the insolvent accept and receive the same in full satisfaction and dis-

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charge: it was held, on special demurrer, that the replication was good, because the fact of the payment being made in satisfaction was necessarily involved in the fact of the receipt being in satisfaction. Though the falsity of a plea is no ground for setting it aside, the court will not lose sight of the fact that is sworn to, in determining whether or not this demurrer is frivolous.

TINDAL, C. J.—The question before us is, not whether or not the replication is capable of being sustained, but whether or not the demurrer is debateable; for, in that case, the defendant has a right to argue it. If the plaintiff had taken issue on the averment that he accepted and received the bill in satisfaction, he would in all probability have had his cause tried before this. I think the rule must be made absolute.

Petersdorff prayed and obtained leave to amend his replication on the usual terms.

Rule accordingly.

Tuesday, May 7th.

In trespass against two magistrates, with a plea of not guilty, it appeared at the trial that the action was brought against the defendants for issuing a distress-warrant for non-payment of a poor-rate, under which the plaintiff's goods were seized. The defendants obtained a verdict; but, the judge not having granted a certificate (though applied to), and there being nothing upon the face of the record to shew that the defendants were sued as magistrates, the Master declined to tax them their double costs under the 7 Jac. 1, c. 5:—Held, that the court had no power, by suggestion or otherwise, to enable the defendants to obtain double costs.

But, semble, that, in the case of a *nonsuit*, a suggestion might be made upon the roll for that purpose.

PENNEY *v.* SLADE and Another.

THIS was an action of trespass against the defendants, two magistrates of the borough of Poole, who had issued a warrant of distress, under which the plaintiff's goods were seized, for non-payment of a poor-rate. The defendants pleaded the general issue. At the trial before Lord Chief Justice Denman, at the Dorset Spring Assizes, 1838, a

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verdict was found for the defendants. In the following Easter Term, a rule nisi was granted to set aside that verdict, and for a new trial, on the grounds of misdirection. and that the verdict was against evidence. This rule was discharged at the sittings in banc after last Hilary Term—Vide ante, p. 285, 5 New Cases, 319.

The Lord Chief Justice not having certified, though applied to, and there being nothing on the face of the record to shew that the action was brought against the defendants for any act done by them by virtue of their office, though *the fact* was not disputed, the Master declined to allow them double costs.

Bompas, Serjeant, on a former day in this term, upon an affidavit of these facts, and that the action was brought against the defendants for an act done by them in virtue of their office as justices of the peace, obtained a rule calling upon the plaintiff to shew cause why a suggestion should not be entered upon the record, that the defendants were sued as magistrates, or why the Master should not tax and allow them double costs.—He referred to the 7 Jac. 1, c. 5, which enacts, " that, if any action, bill, plaint, or suit, upon the case, *trespass*, battery, or false imprisonment, shall be brought in any of his majesty's courts at Westminster, or elsewhere, against any justice of peace, mayor, or bailiff of city or town corporate, headborough, port-reve, constable, tythingman, collector of subsidy or fifteens, for or concerning any matter, cause, or thing by them or any of them done by virtue or reason of their or any of their office or offices, it shall be lawful to and for every such justice of peace, mayor, bailiff, constable, or other officer or officers before named, and all others which in their aid or assistance, or by their commandment, shall do any thing touching or concerning his or their office or offices, to plead the general issue, that he or they are not guilty, and to give such special matter in

7 Jac. 1, c. 5.

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evidence to the jury which shall try the same, which special matter being pleaded had been a good and sufficient matter in law to have discharged the said defendant or defendants of the trespass or other matter laid to his or their charge; and if the *verdict* shall pass with the said defendant or defendants in any such action, or the plaintiff or plaintiffs therein become *nonsuit*, or suffer any *discontinuance* thereof, in every such case the justice or justices, or such other judge before whom the said matter shall be tried, *shall by force and virtue of this act allow unto the defendant or defendants his or their double costs* which he or they shall have sustained by reason of their wrongful vexation in defence of the said action or suit; for which the said defendant or defendants shall have the like remedy as in other cases where costs by the laws of this realm are given to the defendant." And to the 21 Jac. 1, c. 12, by which the former act is made perpetual, and by the 5th section of which the venue is required to be laid in the county where the fact was committed. And he submitted, that, if a certificate was necessary in this case, the judge had no discretion, but was bound to grant it—*Harper* v. *Carr*, 7 T. R. 448.

21 Jac. 1, c. 12.

Crowder and *Bingham* shewed cause.—In *Grindley* v. *Holloway*, Doug. 307, it was held, that, to entitle a defendant (a constable) to double costs under the statute 7 Jac. 1, c. 5, after a verdict for him, it must be certified by the judge who tried the cause that he was acting in the execution of his office: and this was decided upon the authority of an *Anonymous* case in 2 Vent. 45, where a suggestion like that now prayed for was refused, after a verdict for the defendant, on the ground that it was the province of the judge before whom the cause was tried to *allow* double costs. And the like was held in *Harper* v. *Carr*, in which case the judge ultimately did certify. The circumstances of this case, which must be in the recol-

lection of the court, are very strong to shew the propriety, not only of the judge having a discretion in the matter, but of his exercising it by withholding the certificate upon this occasion.

Wilde and *Bompas*, Serjeants, in support of the rule.—The words of the two statutes referred to are plain: where, in an action against a magistrate, &c., the *verdict* shall pass with the defendant, or the plaintiff become *nonsuit* or suffer any *discontinuance*, "the justice or justices, or such other judge before whom the said matter shall be tried, shall, *by force and virtue of this act*, allow unto the defendant his double costs." What is there here to require a certificate? The double costs are to be allowed "by force and virtue of *the act*," not "by force and virtue of *the judge's certificate*." It clearly was not the intention of the statute that the granting or withholding the costs should be in the discretion of any one. The word *allow* means nothing more than adjudge the party entitled to costs; and this the judge at Nisi Prius has no power to do. There could be no certificate in the case of a *discontinuance*, which is one of the cases provided for by the act. Suppose the plaintiff elects to be nonsuited, must the defendant, in order to enable the judge to certify, call witnesses to shew (where the fact does not appear upon the record) that the action is brought against him for something done by him in the execution of his official duty? *Grindley* v. *Holloway* and *Harper* v. *Carr* follow the *Anonymous* case in Ventris; and in neither of them was the 21 Jac. 1, c. 12, referred to. [*Erskine*, J.—They all occurred since the passing of that statute.] All that those cases amount to is this, that the judge who tries the cause has heretofore been in the habit of certifying. The most usual course, where a statute gives double costs, is, to enter a suggestion on the roll of the facts out of which the party's right to such costs arises; as in the case of actions brought in the superior courts

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for debts that ought to have been sued for in courts of requests.

TINDAL, C. J.—It appears to me that this rule must be decided upon the construction of the 7 Jac. 1, c. 5; for, the 21 Jac. 1, c. 12, s. 5, seems not to apply specifically to this case. The last mentioned statute begins with reciting that the former had by experience been found to be a good and profitable law. The 3rd section is made to embrace a new description of persons, viz. churchwardens and overseers, and persons acting in their aid and assistance (114). The 4th section recites that, "whereas, notwithstanding the said statute, the plaintiff is at liberty to lay his action which he shall bring against any justice of peace or other officer in any foreign county at his choice, which hath proved very inconvenient unto sundry of the officers and persons aforesaid, that have been impleaded by some contentious and troublesome persons in countries far remote from their places of habitations." Then comes the 5th section, which professes to provide a remedy, enacting—"that, if any action, bill, plaint, or suit, upon the case, trespass, battery, or false imprisonment, shall be brought against any justice of peace, mayor or bailiff of city or town corporate, headborough, port-reve, constable, tithing-man, collector of subsidy or fifteens, churchwardens, and persons called sworn men, executing the office of churchwarden or overseer of the poor, and their deputies, or any of them, or any other which in their aid and assistance, or by their commandment, shall do anything touching or concerning

(114) The statutes do not extend to actions against parish officers for a nonfeazance, such as the non-payment of money laid out for the support of one of their paupers by another parish into which he went, and for which an action of assumpsit was brought against them—Atkins v. Banwell, 3 East, 92; nor to a judgment as in case of a non-suit in an action brought against them for the price of goods sold and delivered to them for the use of the poor—Blanchard v. Bramble, 3 M. & S. 131.

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his or their office or offices, for or concerning any matter, cause, or thing by them or any of them done by virtue or reason of their or any of their office or offices, the said action, bill, plaint, or suit shall be laid within the county where the trespass or fact shall be done and committed, and not elsewhere:" the clause procceds to give to the persons aforesaid the advantages provided by the former act, which it was perhaps unnecessary to repeat; and then goes on—"And if upon the trial of any such action, bill, plaint, or suit, the plaintiff or plaintiffs therein shall not prove to the jury which shall try the same, that the trespass, battery, imprisonment, or other fact or cause of his, her, or their such action, bill, plaint, or suit, was or were had, made, committed, or done within the county wherein such action, bill, plaint, or suit shall be laid, then, in every such case, the jury which shall try the same shall find the defendant and defendants in every such action, bill, plaint, or suit, not guilty, without having any regard or respect to any evidence given by the plaintiff or plaintiffs therein touching the trespass, battery, imprisonment, or other cause for which the same action, bill, plaint, or suit is or shall be brought: and, if the verdict shall pass with the defendant or defendants in any such action, bill, plaint, or suit, or the plaintiff or plaintiffs therein become nonsuit, or suffer any discontinuance thereof, in every such case the defendant or defendants shall have such double costs, and all other advantages and remedies, as in and by the said former act is limited, directed, or provided." This necessarily carries us back to the former act, to ascertain how those cases are regulated and provided for: and indeed, it is needless to say, that, unless the legislature intended the 7 Jac. 1, c. 5, to continue in force, they would have repealed it.

The 7 Jac. 1, c. 5, provides, that, "if the verdict shall pass with the defendant or defendants in any such action, or the plaintiff or plaintiffs therein become nonsuit, or

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suffer any discontinuance thereof, in every such case the justice or justices, or such other judge before whom the said matter shall be tried, shall by force and virtue of this act allow unto the defendant or defendants his or their double costs which he or they shall have sustained by reason of their wrongful vexation in defence of the said action or suit; for which the said defendant or defendants shall have the like remedy as in other cases where costs by the laws of this realm are given to the defendants." The first observation that is made, and on which reliance has been placed, on the part of the defendants, is, that, inasmuch as the three different events mentioned in the clause —verdict, nonsuit, and discontinuance—cannot all be the subject of a trial, "the justice or justices, or such other judge before whom the matter shall be tried," must apply as well to the court as to the judge of assize or at Nisi Prius; and consequently the allowance of costs is to be made not by certificate only, but may be by suggestion entered on the roll by leave of the court. But, though the words are a little obscure, it appears to me that we must take them according to the subject-matter—verdict or nonsuit, with reference to proceedings before the judge at Nisi Prius—discontinuance, according to the known practice of the court (115); and that the words must have been intended to apply to actions in any court of record—"justice or justices" applying to the judges of assize or Nisi Prius—and "such other judge," to the judges of any court of inferior jurisdiction. This seems to me to give sense to each branch of the clause. And, when we consider that the judge in most cases is cognizant of all the circumstances that ought to regulate the exercise of this discretion, it is obvious that he is the person in whom it ought to be reposed. One case has been suggested, viz.

(115) In the case of a discontinuance, the court would probably make it part of the rule that the plaintiff should pay double costs—Devenish v. Mertins, 2 Str. 974.

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of a nonsuit, where the judge can know nothing of the . That may be a proper case for an application to ourt to enter a suggestion on the roll. But, where a has been had, the presiding judge alone has juris- on in the matter. It is further contended that the *ance* of costs being in all cases the act of the court, and f the judge at Nisi Prius, the statute must have con- lated the interference of the court in the matter. We , however, give the statute a reasonable construction. uld have thought this a ca e for double costs; but, in bsence of an allowance by the learned Chief Justice, nk we cannot direct our officer to tax them. If we were tute of all authority upon the subject, I should have tained the same opinion (116). And it would be im-

3) By the 11 Geo. 2, c. 19, it is enacted, "that, in all s of trespass or upon the case brought against any person sons entitled to rents or ser- f any kind, his, her, or their or receiver, or other person sons, relating to any entry by of this act, or otherwise, upon emises chargeable with such r services, or to any distress ure, sale, or disposal of any or chattels thereupon, it shall ay be lawful to and for the ant or defendants in such to plead the general issue, ve the special matter in evi- any law or usage to the con- notwithstanding; and in case aintiff or plaintiffs in such shall become nonsuit, dis- ae his, her, or their action, e judgment against him, her, a, the defendant or defendants ecover double costs of suit." prothonotary having, in Fin- Seaton, 1 Taunt. 210, taxed costs for the defendant un- der this clause, upon a rule nisi obtained for a review, Vaughan, Serjeant, contended, that, to authorize the allowance of double costs, it was necessary either that the defendant should previously obtain from the judge who tried the cause a certificate that the case came within the act, or that a suggestion should first be entered on the record, whereby the nature of the action might appear. He urged that the prothonotary could only look at the roll, upon which the circumstances of the cause of action did not appear: and he cited Grindley v. Holloway, Doug. 307.

But Sir James Mansfield said—"This act gives the judge no authority to certify, therefore the omission to apply to the judge cannot in this case deprive the landlord of his remedy. There is no question but that the double costs are to be paid. The only remaining question, then, is, whether a suggestion upon the record is requisite to shew on what ground

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proper to unsettle a practice that is supported by a series of cases all putting one uniform interpretation upon the statute. The rule must be discharged.

BOSANQUET, J.—I should have thought, after four decisions, commencing as early as the reign of William & Mary, founded upon what was then said to be an existing usage, followed by a case in the time of Lord Mansfield, another in the time of Lord Kenyon, and another in our own time—*Norman* v. *Danger*, 3 Y. & J. 203—this point might have been considered settled, and we should have been relieved from a discussion of the statute itself. I do not shrink from so doing: but I think it enough to say that I concur in what has fallen from the Lord Chief Justice. Where the cause is tried, and a verdict pronounced, it is for the judge to determine and to certify, if requested, so as to enable the defendants to obtain the benefit of the statute. Here, it appears that the cause has been tried, and that an application has been made to Lord Denman, and he has not granted a certificate. According to *Norman* v. *Danger*, it seems the time for granting the certificate has not yet expired. I am clearly of opinion, that, in the absence of a certificate, the court has no jurisdiction.

COLTMAN, J.—I am of the same opinion. I found my judgment on the simple ground that an uniform course of decisions ought not to be departed from, unless it is found productive of manifest inconvenience or injustice. Without

they are given. But it does not appear on the record that the defendant has double costs; therefore it is not necessary to suggest on the record that there is a cause for double costs. It is not necessary that the judgment should specify more than that a certain sum is allowed for costs, and then all will be right; and it is admitted that no precedent of such a suggestion is to be found. No fact was in dispute between the parties before the prothonotary; it was not denied that the action was brought against the landlord for a distress, so that the prothonotary had sufficient information for his guidance."

saying what my opinion would have been had this been res integra, I must say I think the obtaining a certificate from the judge the most convenient course. Although the 21 Jac. 1, c. 12, was not referred to in the cases cited, we cannot suppose that that statute escaped the attention of the courts.

ERSKINE, J.—It appears to me that the only effect of the 21 Jac. 1, c. 12, s. 5, was, to extend to the cases then for the first time introduced the provisions of the former act, 7 Jac. 1, c. 5; and that it is to this latter statute that we must look for the rule upon this occasion. If this question were now for the first time brought before the court, we should have to determine what would be the most convenient course for making known to the court whether the defendants were entitled to double costs or not. In some cases, undoubtedly, it has been held that a suggestion upon the record is the more convenient course, as in *Rex* v. *Poland*, 1 Str. 49, where a suggestion was entered for treble costs against the prosecutor of an indictment against the defendant for using the trade of a glover, upon an affidavit that he was a soldier, and disbanded upon the peace of Ryswicke, by virtue of the statute 10 & 11 Will. 3, c. 11, which enacts "that the soldiers' time shall be taken as if actually served, and if they be indicted they shall be acquitted on the general issue, and recover treble costs;" and the two cases there cited—*Catheral* v. *Cooper*, where the defendants were sued as acting under the Kensington turnpike act, 12 Geo. 1, c. 37, and acquitted, and they were allowed to make the like suggestion—and *Walker* v. *Sir Philip Egerton*, where there was a suggestion of a nonsuit, to enable the defendant to obtain treble costs (117). But, in cases where a trial has been had, the courts have adopted for themselves a different guide, and

(117) And see Barton v. Miles, Cas. Temp. Hardw. 125.

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have held that the certificate of the judge who tries the cause alone shall give the party a right to double costs. I see no reason why we should depart from this practice.

Rule discharged, with costs (118).

(118) But, where there is a special verdict, and it appears by the facts there found that the act for which the action was brought was done by the defendant by virtue or reason of his office as a justice of the peace, &c., the Master must tax double costs, though there has been no certificate nor allowance by the judge who tried the cause. This was determined in the case of Rann v. Pickins, B. R., M. 23 Geo. 3, Lord Mansfield and Buller, J., said upon that occasion, that, in common cases, where it does not appear upon the record in what capacity the defendant was acting, an allowance by the judge is necessary, but not when it does appear on the record that he was acting by virtue of his office; that the case of a discontinuance, provided for by the statute, shews that the right to double costs was not meant to be confined entirely to such allowance of a judge at Nisi Prius. The Master being asked, said he had no doubt but that he ought to tax double costs. Note to Grindley v. Holloway, Doug. 308.

And see an Anonymous Case, Lofft, 373.

Tuesday, May 7th.

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In covenant against an assignee of a term, for rent accruing whilst she was assignee, issue was taken upon the fact of the defendant being assignee. A witness for the plaintiff proved that he had received on account of the plaintiff rent from one W., who had occupied the premises about the time when the rent in question accrued; the plaintiff then called W., who proved that he was tenant to the defendant under an agreement which did not amount to an *assignment*:—Held, that W. was not an incompetent witness, on the ground of interest:—Held also, that the objection to his competency should have been taken on the voire dire, inasmuch as his position was shewn to be equivocal by the statement of the first witness.

A. agreed, in consideration and *on payment of* 200*l.* at stipulated times, to assign to B. the lease of certain premises, for the residue of a term of which A. was assignee, at the yearly rent of 100*l.*, and under and subject to the covenants, provisos, and agreements in the original lease; and B. agreed to accept the said lease *on payment of* the 200*l.* and interest, and in the meantime and until such assignment was made to pay the rent and perform the covenants in the lease, *and from the same to save harmless and indemnify A.*; with a proviso, that, in case of default in payment of any or either of the instalments of the 200*l.*, A. should be at liberty to re-enter:—Held, that this was not an absolute assignment, but only an agreement to assign on a given event.

THIS was an action of covenant for rent due under an indenture of lease. The declaration stated, that, on the 1st

April, 1812, by a certain indenture then made between the plaintiff of the one part, and one Alexander Christie of the other part, the plaintiff demised unto the said Alexander Christie a certain shop, rooms, and premises, with the appurtenances thereto belonging: to have and to hold the said shop, rooms, and premises thereby demised, with the appurtenances, unto the said Alexander Christie, his executors, administrators, and assigns, from the 25th March then last past, for the term of twenty-six years—yielding and paying yearly and every year during the said term unto the plaintiff, his executors, administrators, and assigns, the net yearly rent of 100*l.*, on the usual days of payment of rent in the year, that is to say, the 24th June, the 29th September, the 25th December, and the 25th March, in each and every year, by even and equal portions —the first payment to be made on the 24th June then next ensuing, clear of all extra and additional taxes which might be laid or imposed upon the said thereby demised premises in consequence of any addition or improvement which the said Alexander Christie, his executors, administrators, or assigns, might make to the same; by virtue of which demise the said Alexander Christie afterwards, to wit, on &c., entered into and upon all and singular the said demised premises, with the appurtenances, and became and was possessed thereof for the said term so to him thereof granted: that, after the making of the said indenture, and during the term thereby granted, to wit, on the 24th August, 1826, all the estate &c. of the said Alexander Christie of and in the said demised premises, with the appurtenances, by assignment thereof then made, legally came to and vested in the defendant, who then entered into and upon the said demised premises, with the appurtenances, and became and was possessed thereof for the residue of the said term, and continued so possessed thereof until and upon a certain other day, to wit, the 25th March, 1830:

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that, after the making of the said indenture, and during the said term thereby granted, and after the defendant became such assignee as aforesaid, and while the defendant was possessed of the said demised premises, with the appurtenances, to wit, on the 25th March, 1830, a large sum of money, to wit, the sum of 150*l.* of the rent aforesaid, for the space of one year and two quarters of the said term then elapsed (the whole of such period having elapsed after the defendant had become and was such assignee as aforesaid, and while she was so possessed of the said demised premises), became and was and still is in arrear and unpaid to the plaintiff, contrary to the tenor and effect of the said indenture, and of the covenants therein contained.

The second plea traversed the assignment, and the third alleged that the 132*l.* did not become due whilst the defendant was possessed of the demised premises, in manner and form as the plaintiff had in his declaration alleged (119).

At the trial before Tindal, C. J., at the sittings in London after last Easter Term, the assignment of the premises to the defendant was proved, and a witness stated that he had received rent from one Samuel Walcot, who was in the occupation of the premises, on account of the plaintiff. Walcot was then called. He stated that he occupied the premises under the defendant from May, 1827, until June, 1829, and paid rent to the plaintiff. He further stated that he had entered under an agreement between the defendant and himself, whereby the defendant, in consideration and on payment of the sum of 200*l.* and interest at the times and in the manner mentioned in a warrant of attorney bearing even date therewith [at 1*l.* per week], agreed to assign unto the said Samuel Walcot, his execu-

(119) There were other pleas that were disposed of on demurrer—see 5 Scott, 506.

tors, administrators, and assigns, at his or their request, costs, and charges, the lease of the said premises: to hold the same unto the said Samuel Walcot, his executors, administratrators, and assigns, for the term of eleven years from Lady-Day then last, being the residue of the term by the indenture of lease demised, at the yearly rent of 100*l.*, and under and subject to the covenants, provisos, and agreements in the indenture of lease to Alexander Christie contained: and the said Samuel Walcot agreed to accept the said lease on payment of the said sum of 200*l.* and interest, and in the meantime and until such assignment should be made, well and truly to pay the rent and perform the covenants, conditions, and agreements in the said indenture of lease contained, and of and from the same to save harmless and keep indemnified the said Elizabeth Watson, her executors, administrators, and assigns; and it was thereby agreed, that, in case default should be made in payment of all or any or either of the instalments mentioned in the said warrant of attorney, the said Elizabeth Watson should be at liberty to re-enter and to enjoy the said premises as in her former estate.

No formal assignment was ever executed by the defendant to Walcot, the latter not having paid any part of the 200*l.*

On the part of the defendant it was submitted, that Walcot was not a competent witness, he being in fact the assignee of the premises under the instrument above set forth, and himself liable to the rent; and that that assignment established the third plea. For the plaintiff, it was contended that the objection should have been taken on the voire dire, and that the above instrument did not amount to an assignment.

A verdict was taken for the plaintiff, with a reservation of leave to the defendant to move to enter a nonsuit on the above grounds.

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Bompas, Serjeant, in Trinity Term last, obtained a rule nisi accordingly.

Peacock, on a former day in this term, shewed cause.—He contended that the instrument in question did not amount to an assignment, but was a mere agreement for a future assignment, provided in the meantime Walcot duly paid the 200*l.* in the manner agreed; that the witness was therefore perfectly competent; and that, at all events, the objection to his competency was not taken in time—1 Phil. Evid. 133.

Walcot an interested witness, and his competency not restored by the statute 3 & 4 Will. 4, c. 42, s. 26.

Bompas, Serjeant, and *Hoggins*, in support of the rule.—Walcot being proved to be in possession of the premises in respect of which the rent was claimed, that was primâ facie evidence that he was assignee; and he could not properly be called for the purpose of discharging himself and fixing the liability upon the defendant. He clearly would not have been a competent witness before the 3 & 4 Will. 4, c. 42, ss. 26, 27, and his competency is not restored by that statute.

In *M'Brain* v. *Fortune*, 3 Camp. 317, it was ruled by Lord Ellenborough, that, in an action for goods sold, a person who entered into a contract for the purchase of the goods in his own name, was not a competent witness to prove that he purchased them as the agent of the defendant. In *Ripley* v. *Thompson*, 12 Moore, 55, in an action of assumpsit for goods sold and delivered, it appeared that the goods were sold by the plaintiff to A., who gave promissory notes for their value, which were dishonored, and A. afterwards became insolvent; it further appeared that A. was in partnership with the defendants, and it was proposed to call him as a witness for the plaintiff, but his evidence was objected to by the defendants, without a release, and was rejected: it was held that A.'s evidence was properly rejected,

on the ground of his being interested in procuring a verdict against the defendants, as in that case he would only be liable for a proportion of the debt. Best, C. J., there said: "I cannot distinguish this case from that of *M'Brain* v. *Fortune*; and, although I do not often rely much upon a decision at Nisi Prius, yet I think the principle upon which that case was determined was correct." So, in *Bland* v. *Ansley*, 2 New Rep. 331, in trespass against the sheriff for taking the goods of A. in execution for the debt of B., where the question was whether or not the goods had been previously assigned by B. to A., B. was held not to be a competent witness to disprove the assignment to A. "The object," says Sir James Mansfield, "of calling Aubray, was, to prove that the goods were his own property, and not that of the plaintiff, and consequently that the execution which had been levied upon the goods to satisfy a debt owing by him was valid; he was therefore called to give evidence, the effect of which would be to pay his own debt with the plaintiff's goods." So, here, Walcot's evidence had a direct tendency to relieve him from a demand for which he was primâ facie liable, and to fix it upon the defendant.

Then, assuming Walcot to have been assignee of the premises, does the statute make him competent. The 26th section, "in order to render the rejection of witnesses on the ground of interest less frequent," enacts, "that, if any witness shall be objected to as incompetent, *on the ground that the verdict or judgment* in the action on which it shall be proposed to examine him, *would be admissible in evidence for or against him*, such witness shall nevertheless be examined, but, in that case, a verdict or judgment in that action in favour of the party in whose behalf he shall have been examined, shall not be admissible in evidence for him or any one claiming under him, nor shall a verdict or judgment against the party on whose behalf he shall have been examined be admissible in evidence against him or any one

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claiming under him" (120). In *Burgess* v. *Cuttill*, 6 C. & P. 282, 1 M. & Rob. 315, it was held that the statute does not make the drawer of an accommodation bill a competent witness for the defendant in an action by the indorsee against the acceptor. [*Bosanquet*, J.—That case occurred very soon after the passing of the act; and it has been very much doubted (121).] In *Yeomans* v. *Legh*, 2 M. & Welsby, 419, it was held, that, in an action on the case for negligence in driving by the defendant's servant, the servant, since the 3 & 4 Will. 4, c. 42, is a competent witness for the defendant without a release, his name being indorsed on the record. Parke, B., there says: "The effect of the clause in the statute is, to make the witness competent, where the *only* interest is, that the verdict may be used for or against the witness. In this case there is no interest, except that the verdict might be used against him in an action by his master, to shew the amount of the damages recovered. I am clearly of opinion that the effect of the act is, to take away the objection to the admissibility of the witness in cases of this sort, and that its operation is not restricted to cases in which it was before impossible to make the witness competent by a release." The objection here is that the witness gets by his own evidence an immediate discharge from liability as assignee: he pays his own debt by his own evidence.

If the witness was incompetent on the ground of interest, it was not necessary that the objection should be taken on the voire dire (122).

(120) In the margin of this clause in the statute, the word "solely" is unjustifiably introduced.

(121) See Faith v. M'Intyre, 7 C. & P. 44, where Parke, B., held, that, in an action on a bill of exchange by the indorsee against the acceptor, the drawer was a competent witness for the defendant, his name being indorsed on the postea, under the 3 & 4 Will. 4, c. 42, s. 27.

(122) In Starkie on Evidence, Part 2, p. 121, the rule is thus stated:—In general, an objection to competency ought to be taken in the first instance, and before the witness has been examined in chief; for, otherwise it would afford an

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As to the legal effect of the instrument.

The instrument in question was in legal operation an actual assignment; the effect of it being an immediate transfer from Mrs. Watson to the defendant of all her interest in the premises—*Palmer* v. *Edwards*, Doug. 187, n.; *Curtis* v. *Spitty*, 1 Scott, 737; Bacon's Abridgment, *Lease*, (K). In *Poole* v. *Bentley*, 12 East, 168, it was held that an instrument containing words of present demise will operate as a lease, if such appear to be the intention of the parties, though it contain a clause for a future lease; such future lease being merely for further assurance, and the instrument containing a clause declaring that the agreement "was to be considered binding till one fully prepared could be produced." In *Pinero* v. *Judson*, 6 Bing. 206, 3 M. & P. 497, an agreement for a lease, with stipulations for the lessee to commence with laying out a considerable sum on the premises (the lease to contain certain specified covenants), "and in the meantime, until such lease shall be executed, to pay rent, and to hold the same premises subject to the covenants above mentioned," was held to amount to an actual demise. So, in *Warman* v. *Faithfull*, 5 B. & Ad. 1042, 3 N. & M. 137, it was held that a memorandum of an agreement to let, which contains words of present

unfair advantage to the other party, who would avail himself of the testimony of the witness if it were favourable, but would get rid of it by raising the objection if it turned out to be adverse. It has however been held, that, if it be discovered at any stage of the trial that a witness is interested, his evidence may be struck out—Turner v. Pearte, 1 T. R. 720; Howell v. Lock, 2 Camp. 14; Perigal v. Nicholson, Wightwick, 64. It was formerly the practice, when an objection was made to the competency of a witness, to make it before he was sworn in chief, and to swear and examine him where his incompetency was supposed to arise from interest on the voire dire; and after a witness had been examined in chief, the objection could no longer be taken —Lord Lovat's Case, 9 State Trials, 639, 646, 704. But the same strictness is not observed in modern practice; where the incompetency arises from interest, the objection may be taken after the witness has been examined in chief, if in the course of the cause it appear that he is interested—Stone v. Blackburn, 1 Esp. 37.

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demise, and sufficiently ascertains the terms of the intended tenancy, will operate as a present demise, although it provides for the preparation of a future lease. Lord Denman there says: "Every thing necessary to a complete and perfect lease is contained in the instrument. A specific rent is reserved; the times at which the tenancy is to commence, and the rent to become payable, are ascertained." *Chapman* v. *Bluck*, 4 Scott, 515, 4 New Cases, 187, where most of the cases are collected, is an authority to the same effect. And see *Pluck* v. *Digges*, 5 Bligh, N. S. 31. In the present case, the clause of re-entry shews the contemplation of the parties that the immediate possession should be devested out of the defendant and vested in Walcot; and to render available a clause of re-entry, it was not necessary that Mrs. Watson should have a reversion—*Doe d. Freeman* v. *Bateman*, 2 B. & Ald. 168. If the instrument amounts to a present demise, it is not the less an assignment because it may be defeasible on non-payment of the 200*l.* in the manner agreed.

As to the legal effect of the instrument.

TINDAL, C. J.—It appears to me that the instrument in question (which must be interpreted according to the apparent intention of the parties) is merely an agreement to assign, and not an actual assignment. It appears to have

costs, and charges, the lease of the said premises:" and Walcot agrees "to accept the said lease *on payment of the sum* of 200*l.* and interest." It evidently was not intended as an instrument that was to receive its full effect at the moment of its execution, but only on payment of the stipulated sum: and that has never been paid. Walcot further agrees, "in the meantime, and until such assignment should be made, well and truly to pay the rent and perform the covenants, conditions, and agreements in the said indenture of lease contained, and of and from the same to save harmless and keep indemnified the said Elizabeth Watson, her executors, administrators, and assigns." If the instrument was intended to operate as an absolute assignment, this stipulation would have been useless: for, after the assignment, Mrs. Watson would be no longer liable to the performance of the covenants: whereas, it it would be a sensible and pertinent provision if the instrument was not intended presently to pass the whole interest. For these reasons I think this instrument operated only as an agreement for a future assignment; and consequently Walcot was not an interested witness.

Objection to Walcot's testimony should have been taken on the voire dire.

The next question is whether the objection to Walcot's testimony ought not to have been taken on the voire dire. It appears that the first witness that was called, stated, that he had received rent from Walcot on account of the plaintiff, Walcot then occupying the premises. There is nothing in the circumstance of a man being found upon the premises to fix him as assignee. He might have an interest or he might not. The witness standing in this equivocal position, the case seems to me to be precisely one where an explanation should be called for on the voire dire. The very point seems to have been determined in *Bunter* v. *Warre*, 3 D. & R. 106, 1 B. & C. 689: there, in replevin by A. for growing crops, the point at issue was whether A. and B. were joint tenants to C. of the land on which the distress was made; and it was held, that B. might be examined

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as a witness to disprove the joint-tenancy, not being liable to costs; and that he was at least examinable on the voire dire as to his interest in the event of the suit. Bayley, J., there said: "It is the constant practice in such cases to examine the witness on the voire dire, as to the facts upon which his competency depends, and it is a proper and necessary course to pursue." And Best, J., said: "There was no direct evidence to prove the witness a co-lessee; the presumption was rather the contrary way; and at least he should have been interrogated as to the fact on the voire dire. The exclusion of evidence, without even an examination on the voire dire, has never yet been carried beyond a witness who appears to be a party to the record, which is not the case here." I think the rule must be discharged.

BOSANQUET, J.—There are two questions in this case—first, whether the instrument in question was properly produced in evidence—secondly, what effect ought to be given to it when produced.

As to Walcot's interest.

It is said that Walcot was an interested witness, and therefore that the testimony he gave ought to be laid out of the case. The way in which his interest was brought before the court was by a witness shewing him to be in possession of the premises and paying rent; and that, it was contended, was prima facie evidence that he was assignee. When a witness is objected to on the ground of interest, the question of his admissibility is ordinarily to be ascertained upon the voire dire. But it is said, that, in this case, as the suggestion of the witness's interest came from the side of the party who produced him, the plaintiff was not entitled to get rid of the presumption of interest on the voire dire. The evidence was quite equivocal; and it would be very extraordinary if the character of the witness's possession might not be inquired into in the ordinary way, by examining himself. That which comes from the witness on the voire dire is not evidence; it is matter

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for the consideration of the judge, to enable him to decide whether the witness is admissible or not: he may himself examine him. The question was distinctly brought under the view of the court in *Bunter* v. *Warre*, which appears to me to be decisive of the question.

As to the effect of the instrument.

The next question is, what is the effect of the instrument. I quite agree that we must collect the intention of the parties from the face of the instrument, and construe it accordingly. If it be apparently the intention of the parties that the whole interest should pass immediately, then the instrument must operate as an assignment; if for a limited time, it will be a lease. But it appears to me that the intention here is clearly expressed, that, on payment of the 200*l.* and interest in the manner provided for, then, and not till then, the assignment shall take place: Walcot covenants in the meantime, and until the assignment should be made, to pay the rent and perform the covenants in the lease; and a right of re-entry is reserved to Mrs. Watson in default of payment of the instalments. Whatever the interest that Walcot took under this instrument in the meantime (and it is unnecessary to consider the nature of that), it is quite clear that there was to be no assignment until the money was paid. It is perfectly competent to parties to make a lease for three, five, or seven years, and to stipulate, that, at the end of the term, or on the happening of a given event, the premises should be assigned for the residue of the lessor's interest in the premises. And there is no inconvenience in that.

COLTMAN, J.—The right of examining a witness on the voire dire is common to both plaintiff and defendant: there would be no justice in allowing the party objecting to the competency of the witness, to examine him on the voire dire for the purpose of shewing him interested, and not giving equal right to the other side to shew by examination of the witness that he is not interested.

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With respect to the writing; it cannot be denied that it has a double aspect. Upon the whole I think it is an agreement for a future assignment only. The covenant to indemnify Mrs. Watson would be wholly unnecessary if this were an absolute assignment.

Walcot's evidence properly received.

ERSKINE, J.—I entirely concur with the rest of the court upon both points. If Walcot were prevented by any technical rule of law from being examined in this case, the result would be a failure of justice. *Bunter* v. *Warre* is an authority to shew that his testimony was properly received. The statement of the preceding witness, at the most, placed Walcot in an equivocal situation: it was for the judge to decide whether or not his situation was such as to shew him interested in the event of the suit: it seems reasonable that he should have an opportunity to make an explanation. The point of interest on the present occasion happened to be the very point in issue in the cause, viz. whether or not Mrs. Watson was possessed as assignee.

As to the effect of the instrument.

The instrument being in evidence, the next question is, what was its effect—whether it conveyed out of Mrs. Watson all her interest in the premises. It appears to me that it was only an agreement for a future assignment. Upon one point, all the cases on this subject concur—the whole of the instrument must be looked to in order to ascertain the intention of the parties. The circumstance of the language having reference to the future execution of a lease or assignment, certainly will not prevent the instrument from conveying a present interest. I am clearly of opinion that the intention of the parties here was that this instrument should not operate as an assignment until the 200*l.* should be fully paid. The interest conveyed was a mere right of occupation in the mean time.

Rule discharged.

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DEVAUX *v.* I'ANSON.

Wednesday, May 8th.

The owner of a vessel effected a policy on freight "at and from Calcutta, or any port or place on the Coromandel Coast, to any port or place at Bourbon." The vessel put in at Coringa, a port on the Coromandel coast, for the purpose of repair. The repairs were completed, and a full cargo purchased for the owner and deposited in warehouses at a place distant about seven miles from Coringa, ready to be put on board. Whilst in the act of being got out of the dock in which the repairs were done, the vessel received such injury as to make her a total wreck, and render abandonment necessary:— Held, that the interest of the assured in the subject-matter of insurance was properly described in the policy as *freight*; and that the interest of the assured had commenced and the policy had attached at the time the loss took place.

THIS was an action of assumpsit on a policy of insurance. The declaration stated that the plaintiff caused himself to be insured, lost or not lost, at and from Calcutta, or any port or ports, place or places, all or any, and in any succession, on the Coromandel coast, to any port or ports, place or places, in Bourbon, upon any kind of goods and merchandizes, and also upon the body, tackle, apparel, ordnance, munition, artillery, boat, and other furniture of and in the ship called La France, beginning the adventure upon the said goods and merchandizes from the loading thereof on board the said ship at as aforesaid, upon the said ship at as aforesaid, and so to continue upon the said ship until she should be arrived at Bourbon aforesaid, and be moored at anchor twenty-four hours in good safety, and upon the goods and merchandizes until the same should be there discharged and safely landed. It was to be lawful for the said ship in that voyage to proceed and sail to and touch and stay at any port or ports, place or places whatsoever, without prejudice to the insurance: the said ship, goods and merchandizes &c., for so much as concerned the assured, by agreement between the assured and assurers in that policy, were to be valued at 1,000*l.*: the perils which the assurers were contented to bear, were of the seas &c., and all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandizes and ship, or any part thereof: and by a certain memorandum made on the said writing or policy of insurance, the said insurance was declared to be on 1,000*l.*, on the freight of the said vessel, valued at 1,000*l.* Averment of promise by the defendant to become an assurer, in consideration of premium; of interest in the

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plaintiff; that the ship was in good safety at a certain port or place on the Coromandel coast, called Coringa; and that, whilst the ship was at Coringa aforesaid, and before and at the time of the loss thereinafter mentioned, divers goods and merchandizes, amounting to a full cargo of the said ship, which had been bought, procured, and contracted for, for and on account of the said person so interested in the subject-matter of insurance as aforesaid, were there, to wit, at Coringa aforesaid, for the purpose of being shipped and loaded, and which, but for the loss thereinafter mentioned, would have been shipped and loaded in and on board the said ship, to be conveyed therein on the said voyage in the said policy of insurance mentioned, to wit, from the Coromandel coast aforesaid to Bourbon aforesaid; that afterwards, and whilst the ship was at Coringa aforesaid, and during the continuance of the said risk in the said policy mentioned, to wit, on &c., the said ship was broken, damaged, and destroyed, and rendered wholly incapable of pursuing the said voyage, by certain perils which the said assurers by the said policy did take upon themselves as aforesaid, to wit, by the accidental breaking and giving way of the tackle and supports whereby the said ship was supported, in being moved from a certain dock; in consequence of which breaking and giving way, the said ship struck violently against the sand, and was bilged, broken, destroyed, damaged, and rendered incapable of pursuing the said voyage as aforesaid; and the said ship, and the freight, and all benefit, profit, and advantage which the said person so interested as aforesaid would otherwise have derived and acquired from the employment of the said ship in the carrying and conveying the said goods and merchandize on the said voyage in the said policy mentioned, and the means of carrying and conveying the said goods and merchandize, were by the means aforesaid wholly lost to the said person so interested as aforesaid; whereof the defendant afterwards, to wit, on &c.,

had notice; by reason whereof the defendant became and was liable to pay and ought to have paid the sum of 200*l.* so by him insured as aforesaid. 1839. DEVAUX v. I'ANSON.

There was also a count for money had and received.

The defendant pleaded—First, that the goods and merchandizes in the declaration in that behalf mentioned had not, before and at the time of the loss in the first count mentioned, been bought, procured, and contracted for, for and on account of the said person in the declaration in that behalf mentioned, to be carried and conveyed in the said ship—Secondly, that, at the time of the loss in the declaration mentioned, the risk in the said writing or policy of insurance mentioned had not commenced, and the said writing or policy of insurance had not attached in manner and form as in and by the declaration was alleged—Thirdly, that the said ship was not, at the time of the commencement of the risk insured against by the said policy in the declaration mentioned, seaworthy—Fourthly, that the ship was not broken, damaged, and destroyed, and rendered incapable of pursuing the said voyage by any perils which the said assurers by the said policy did take upon themselves, in manner and form as in and by the said declaration was alleged—Fifthly, that the ship was not at any time after the making of the said policy, and before the said loss in the first count mentioned, in good safety at any port or place on the Coromandel coast in the said policy mentioned, in manner and form as by the declaration was alleged—Sixthly, as to the money alleged to have been received by the defendant to the use of the plaintiff, that the defendant brought into court 20*l.* 10*s.*, beyond which the plaintiff had sustained no damage—Seventhly, to the residue of the declaration, that the defendant did not promise modo et formâ.

First plea. Second plea. Third plea. Fourth plea. Fifth plea. Sixth plea. Seventh plea.

A verdict was found for the plaintiff, damages 200*l.*, subject to the opinion of the court upon the following case: and it was agreed, that, upon matters of fact in the case,

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the court should be at liberty to draw the same conclusion as in their judgment ought to be drawn by a jury:—

The ship La France, mentioned in the policy, sailed from Havre in the early part of December, 1830, upon a voyage to and in the Indian ocean, under the direction of M. Samoise as supercargo and general agent of the owner. Previous to her sailing, she was carefully surveyed by competent persons, and reported to be perfectly staunch and seaworthy. She soon met with very rough weather, in consequence of which she sprung a leak. About the end of March, 1831, she arrived at Bourbon, where she was surveyed by a commission out of the Admiralty court of St. Denis, in that island. It appeared that the leak had been caused by a bolt becoming loose between the ribs on the starboard side on the lower floors. Under the authority of the Admiralty court, she underwent a temporary repair, the completion of the repairs being postponed until the arrival of the ship in India, in consequence of there being no convenience at Bourbon for getting at the bottom of the ship, and it being impossible to do the repairs necessary to stop the leak whilst she lay in the roadstead. The court therefore declared that it was necessary to take the vessel to India, in order that she might there be hove down, and the leak be repaired on the outside; and they authorized the captain to proceed to India for that purpose. About the 18th or 20th of April, 1831, she left Bourbon; and it was sworn by the supercargo who was on board, that the leak was much diminished by the temporary repair at Bourbon. On passing near Ceylon, the vessel struck violently two or three times upon a bank off Point Pidre, on the 24th May, 1831. She arrived at Coringa, a small English port and station on the coast of Coromandel, in India, on the 6th June, 1831; and, having been unballasted, was surveyed under the authority of the local tribunals, agreeably to the French law. The surveyors reported, as the fact was, that the leak, which the captain

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had been authorized by the marine court of St. Denis to come to one of the ports in India to repair, still existed, and that it proceeded from the lower floors, although the vessel was entirely unballasted: in consequence whereof they authorized the captain to take his ship up the river, and thence into a dock, as is customary in that country, in order to repair the damages the ship might have sustained, which could not be ascertained until the ship was put into a dry dock. She was accordingly taken up the river; and it was necessary to lodge her in a dock where her bottom could be worked upon. The usual and proper mode of taking a vessel into dock for repair, and out again, at Coringa, and which was pursued on the present occasion, is as follows:—It is necessary to make an excavation in the dock, as, in consequence of its being seldom used, the sea is allowed to flow into it, whereby a deposit of soft mud is formed: when the excavation has been made, and the hard bed of sand at the bottom of the dock arrived at, the ship is hauled head foremost into the open space thus afforded: two lines of bamboo stakes are then driven into the mud across the entrance of the dock, the space between the two rows of stakes being filled up with earth thrown out of the dock, which is thus closed from the sea, although a quantity of water still remains at the bottom: the natives again throw in the soft mud and soil, which has the effect of raising the ship; and then the water which has remained when the dock is closed, is baled out of the dock into the sea: piles are then driven into the mud on each side of the vessel, and, being driven down to the hard bottom of the sand, they form a good support for the vessel. The mud is then cleared sufficiently to admit of the vessel being inspected and repaired. When the vessel has been repaired, she is brought again into the water in the following manner:—Four thick columns of earth are formed under the vessel; they are each bound round with a coil of cable made of cocoa nut fibre, and then the piles being removed

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the vessel rests on these columns so bound: the water is then again let into the dock by re-opening the entrance; the cables are uncoiled by degrees; the vessel is gradually let into the water, and she is then floated out.

What was necessary to be done to raise and place the La France in the dry dock in a state for repair in the manner before described, was all completed about the 3rd or 4th August, and the vessel was then lying in the dry dock open to inspection of her bottom. Immediately afterwards the repairs were commenced.

About two days after she had entered the river, viz. on the 22nd June, Samoise had commenced the purchase of the ship's return cargo for Bourbon; and before the completion of the repairs he had purchased the whole. It consisted of rice, buffalo horns, and hides; and it was safely deposited in certain warehouses at Jaggernackfoeran, which is distant seven miles from Coringa. The purchases were made on account of the person mentioned in the declaration as interested, who was the owner of the ship.

It was sworn by the supercargo, who was at Coringa at the time, that, on the 14th August, the ship was quite ready for sea, and might have been got afloat in a couple of hours: and it was reported by the surveyors who had made a survey on the 14th August, that those repairs had been

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mould, viz., two forward, a little abaft the fore channels, and two astern, on the starboard and larboard sides, and about ten feet afore the mizen mast. The workmen then began to remove the sand which was under the vessel, and which consolidated the shores upon which the ship was resting still. As the work was going on progressively, it was perceived that the starboard fore cable more especially was straining the vessel; and immediately the captain communicated it to the harbour-master, who assured him it was of no moment. At last, while the work was going on, at two o'clock in the afternoon of the 15th August, the evil increasing in the captain's judgment, he went on board the ship, accompanied by his mate and the ship's carpenter, to see whether anything had given way. He then found that two ribs at the fastening of the starboard forecable had broken already. He immediately wrote to the captain of the port of Coringa intrusted with the repairs of the vessel, to come to the spot without loss of time, in order to remedy the damage, if it were possible. He consulted with the harbour-master, and it was decided by them, that, as the vessel could not remain in the position in which she was, it was indispensable to lower her entirely, by removing the shores from under the keel. The next day, the 16th August, this was done; but, during that operation, the two stern cables and the larboard fore cable were forcing in the ribs and thick stuff, although they had been pillared the evening previous against the barlings of the hold and between decks. The stauncheons of the kelsons having all fallen from the force of the lower masts upon the keel, the garboard streak gave way nearly from end to end; and when, at last, the ship was no longer upon the shores, she sank into a muddy sand, when it was found impossible to repair her without raising the ship again by the process used in the country.

At the time of her sustaining the injury, the depth of water in the dock was about four feet.

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A survey was made of the fresh injuries she had sustained, on the 30th August: it appeared that the cost of the repairs would amount to considerably more than the worth of the vessel; that no money upon bottomry or otherwise could be borrowed for the purpose of executing those repairs; and that eight months time would be required to procure the necessary materials for the repair from other places.

Abandonment.

On the 31st August, the president of the Tribunal du Premier Instance, at Janson, a French factory situate about three miles from Coringa, directed an abandonment of the vessel, and that such abandonment was necessary. She was then broken up and sold.

The cargo which had been purchased for the La France was shipped on board an English vessel, and by her conveyed to Bourbon, and above 6,000 rupees were paid to the captain of that ship for the freight thereof.

Questions.

The question for the opinion of the court upon the preceding facts were those raised by the several issues, and the judgment upon each issue was to be entered according to that opinion. If the judgment should be for the plaintiff, the amount was to be the same for which the verdict had been entered.

The case was argued in Hilary Term last.

Wilde, Serjeant, for the plaintiff (*Maule* and *Barstow* were with him).—1. The first question for consideration is, whether or not the plaintiff had an insurable interest in the subject-matter of the policy—whether it properly falls within the description of "freight." The plaintiff clearly had an insurable interest in the additional value imparted to the goods by the carriage: and there is no inconvenience in a ship-owner describing the profit to be derived from the carriage of goods (though his own) by his term. That a ship-owner having effected a policy on freight, may, in the event of loss, recover from the underwriter the value of

1. As to the nature of the assured's interest.

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the benefit he, the ship-owner, would have derived (if there had been no loss) by carrying his own goods on the voyage insured, was expressly decided in the late case of *Flint* v. *Flemyng*, 1 B. & Ad. 45. Lord Tenterden there says: "If it be a necessary ingredient in the composition of freight, that there should be a money compensation paid by one person to another, the benefit accruing to a ship-owner from using his own ship to carry his own goods, is not freight. But, if the term *freight*, as used in the policy of insurance, import the benefit derived from the employment of the ship, then there has been a loss of freight. It is the same thing to the ship-owner whether he receives that benefit of the use of his ship by a money payment from one person who charters the whole ship, or from various persons who put specific quantities of goods on board, or from persons who pay him the value of his own goods at the port of delivery, increased by their carriage in his own ship. The assured may fairly consider that additional value as freight, and so term it in a policy. Before the statute of 19 Geo. 2, c. 37, it was not necessary to prove any interest in the subject-matter of insurance. Since that statute, it would be as good a proof of interest in freight, to shew that the owner of a ship was conveying his own goods in his own ship, as that he was conveying the goods of others. Then, as to the other point, to recover upon a policy on freight, the assured must prove that but for the intervention of some of the perils insured against, some freight would have been earned, either by shewing that some goods were put on board, or that there was some contract for doing so." And Bayley, J., adds: "Whether the ship-owner carry his own goods or the goods of another person, is immaterial to him. In either case, he has to pay the whole expense of the ship, of provisions, and of wages; he may fairly expect to reimburse himself out of the profit he may derive from carrying goods being his own property, or that of others, and he may insure that profit under the

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name of freight, whether it accrue from the price paid for the carriage of the goods of others, or from the additional value conferred on his own goods by the carriage." All contracts of insurance on freight made since that decision, must be held to have used the word "freight" with reference to the meaning there attributed to it.

2. As to whether the policy had attached.

2. The next question is, whether or not the policy had attached, or the risk commenced, at the time of the loss. The principle deducible from all the authorities seems to be, that, where there is a contract for the shipment of goods, the vessel in a condition to receive the goods, and the goods ready to be put on board, and the owner is, by reason of one of the perils insured against, prevented from earning freight, he has sustained a loss within the terms of the policy. The earliest case upon the subject is that of *Tonge* v. *Watts*, 2 Str. 1251. There, the plaintiff insured on ship and freight at and from Jamaica to Bristol. *A cargo was ready to be put on board;* but *the ship being careening,* in order for the voyage, a sudden tempest arose, and she was lost. The plaintiff claimed for the freight the ship would have earned in the voyage if the accident had not happened. But, *as the goods were not actually on board,* so as to make the plaintiff's right to freight commence, Lee, C. J., held that he could not be allowed it; and he was nonsuited. There *the ship was not ready to receive the cargo.*

Tonge v. *Watts.*

Montgomery v. *Eggington.*

In the next case, *Montgomery* v. *Eggington,* 3 T. R. 362, where *part of the goods were actually on board,* the rest *ready to be shipped,* and *the vessel ready to receive them,* the assured was held entitled to recover the full amount upon a valued policy. *Forbes* v. *Aspinall,* 13 East, 323, is a more important case. There, freight *valued* at 6,500*l.* was insured on a ship from any port or ports in Hayti to Liverpool; and the ship, which had sailed with goods from Liverpool to Hayti, on a voyage of barter, after exchanging a *part* of her outward cargo for fifty-five bales of cotton at one port of Hayti, proceeded with the same to another port,

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for the purpose of making a similar barter of the rest of the outward cargo, but was lost by a peril of the sea before it was effected: the assured was held to be only entitled to recover for the freight of the fifty-five bales of the return cargo on board; though there was a moral certainty at the time, that the remaining part of her outward cargo would, except for the loss, have been exchanged for a full return cargo; for, shortly after the loss of the ship, the goods saved from the wreck were in fact exchanged for more produce than was sufficient to have covered the freight insured. In that case, though there was a strong probability that freight would be procured, there was no contract binding any one to ship a homeward cargo: and it was upon this that the judgment of the court proceeds. Lord Ellenborough there says: "Freight is the profit earned by the ship-owner in the carriage of goods on board his ship; and an insurance upon freight is an insurance made in order to secure that profit to the ship-owner, in case he is prevented by any of the perils insured against from actually earning such profit. An insurance upon *freight* has no reference to the *hull* of the ship, or to its *outfit* for the voyage; both of which are protected by insurance upon the *ship*: but its sole object is, to protect the assured from being deprived, by any of the perils insured against, of the profit he would otherwise earn by the carriage of goods. To recover, therefore, in any case upon a policy on freight, it is incumbent on the assured to prove, that, unless some of the perils insured against had intervened to prevent it, some freight would have been earned; and, where the policy is open, the actual amount of the freight which would have been so earned, limits the extent of the underwriter's liability. In every action upon such a policy, evidence is given, either that goods were put on board, from the carriage of which freight would result, or that there was some contract under which the ship-owner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight:

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and, in either case, if the policy be open, the sum payable to the ship-owner for freight, together with the premiums of insurance and commission thereupon, is the extent to which the underwriters are chargeable. In this case, therefore, *as there was no contract under which the ship-owner could claim freight but for the goods actually shipped on the homeward voyage*, the assured could have made no claim, had this been an open policy, but to the extent of the actual freight on the fifty-five bales of cotton which were shipped for this country, and of the premiums and commission thereon. And indeed that point has been settled against this very plaintiff in an action on an open policy on this very risk, in *Forbes* v. *Cowie*," 1 Camp. 520. His lordship then proceeds to consider whether the circumstance of that being the case of a *valued* policy made any essential difference: and he decides that it did not. Speaking of *Montgomery* v. *Eggington*, his lordship says: "There, a full cargo was ready to be laden, and the ship in a state ready to receive it, and nothing but the perils insured against did or (as appears) could prevent its being received: here it was uncertain whether any additional cargo could have been ever procured, and the outward cargo must also have been discharged before the homeward cargo could have been completed: so that the ship was not ever in a condition to receive her homeward cargo, if the cargo had been ready, which it never was, to have been put on board." In *Thompson* v. *Taylor*, 6 T. R. 478, where a ship was chartered from London to Teneriffe, there to take on board a certain number of pipes of wine, and proceed to Barbadoes, &c., for which the owner was to receive freight at the rate of so much per pipe, it was held that the owner had an insurable interest though the goods were not on board, the vessel having commenced the voyage. From the principles laid down in that case Lord Ellenborough never departed. *Horncastle* v. *Suart*, 7 East, 400, *Truscott* v. *Christie*, 2 B. & B. 320, 5 Moore, 33, *Parke* v. *Hebson*, cited 2 B. & B. 326,

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5 Moore, 41, *Davidson* v. *Willasey*, 1 M. & S. 313, and *Warre* v. *Miller*, 7 D. & R. 1, 4 B. & C. 538, are also authorities to shew, that, in all cases where the freight is lost by a peril insured against, the assured is entitled to recover, though no goods be actually on board, provided the ship is ready to receive them, and the goods are ready to be shipped, or the owner has a contract with any one for their shipment. The evidence of a contract may vary; it may be by letters, as in *Parke* v. *Hebson*, or by charter; it is enough to shew that the ship would have earned freight but for the happening of a peril insured against. The present case is much stronger than any of those: the cargo was actually purchased, and waiting to be put on board. In *Camden* v. *Cowley*, 1 Sir W. Blac. 217, and *Williamson* v. *Innes*, 8 Bing. 81, n., 1 M. & Rob. 88, it was held that a homeward policy at and from a given place attaches when the ship is at that place, in a condition to begin to take in her homeward cargo.

3. As to seaworthiness.

3. The third question is, whether the ship was seaworthy at the time of the inception of the risk. Generally speaking, a policy "at and from" a foreign port attaches when the ship arrives there in a condition to lay at safety, and to resist ordinary perils—*Parmeter* v. *Cousins*, 2 Camp. 235; *Bell* v. *Bell*, 2 Camp. 475. Lord Ellenborough, in *Parmeter* v. *Cousins*, says: "To be sure, while the ship remains *at* the place, a state of repair and equipment may be sufficient, which would constitute unseaworthiness after the commencement of the voyage. But, while in port, she must be in such a condition as to enable her to lie in reasonable security till she is properly repaired and equipped for the voyage. She must have once been *at* the place in good safety. If she arrives at the outward port so shattered as to be a mere wreck, a policy on the homeward voyage never attaches." And in *Annen* v. *Woodman*, 3 Taunt. 299, it was held that a ship is seaworthy, if she is sufficiently furnished for the service in which she is for the present

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time engaged; therefore, a ship much out of repair is seaworthy in harbour, and is protected under the word "at:" the condition that she shall be seaworthy for the voyage does not attach till her sailing. In *Forbes* v. *Wilson*, Park Ins. 6th edit. 299, n., in an action on a policy "at and from Liverpool to the coast of Africa," &c., it appeared that at the time the policy was made the ship was not in a condition to go to sea, but was in fact at the time undergoing very material repairs; and it was contended on behalf of the underwriters, that, as the risk described was *at* as well as *from*, if the ship was not sea-worthy, from whatever cause, when the policy was subscribed, it was void, and that any repairs done afterwards, so as to make her completely sea-worthy at the time of sailing, would not cure that defect. Lord Kenyon was of opinion, that, under the words *at and from*, it is sufficient if the ship be seaworthy at the time of sailing, for, from the nature of the thing, the ship, while *at* the place, probably must be undergoing some repair. His lordship held the same opinion in *Smith* v. *Surridge*, 4 Esp. 25. And in *Hibbert* v. *Martin*, Park Ins., 5th edit., 299, n., *Forbes* v. *Wilson* being cited, Lord Ellenborough said: "I agree with the doctrine of that case: it is quite sufficient if the state of the ship be commensurate to her then risk. There may be a state of sea-worthiness sufficient while in harbour; and there is a state of sea-worthiness for the voyage." There is nothing in the present case to warrant an opinion that this vessel when taken up the river at Coringa for the purpose of necessary repairs was not in a competent state to resist any peril by which she was likely to be assailed while there: there is no statement that she was exposed to any peril which her state of repair rendered her incapable of withstanding.

4. The loss occasioned by a peril insured against.

4. The next question is, whether the loss was occasioned by one of the perils insured against. The words of the policy are very comprehensive: they include not only

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"perils of the sea" but "all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the subject-matter of the insurance." The ship having been safely placed in the dock for the purpose of being repaired, and having been repaired, was damaged whilst being got out of the dock. In *Hodgson* v. *Malcolm*, 2 B. & P. 336, in moving a ship from one part of a harbour to another, it became necessary to send two of the crew on shore to make fast a new line, and cast off the rope by which the ship was made fast; those two men being immediately impressed and carried away, and not being allowed by the press-gang to cast off the rope in question, the ship in consequence thereof went ashore and was lost: and it was held that this was a loss by the perils of the sea within the policy. In *Cullen* v. *Butler*, 5 M. & S. 461, on a policy of insurance on goods in the common form, where the ship and goods were sunk at sea by another ship's firing upon her, mistaking her for an enemy; it was held that the assured was entitled to recover upon a special count stating the particular circumstances; for this was within the general words of the policy "all other perils, losses," &c. In *Bishop* v. *Pentland*, 1 M. & R. 49, 7 B. & C. 219, the vessel was in the course of the voyage driven by necessity into a tide harbour, where she was moored along the quay, in the place usual for ships of her burthen, and in as safe a situation as could be found; and, being sharp built, she was lashed to the pier by a rope from her mast-head, which the mate insisted was sufficient, though it was objected to by the pilot who had brought the ship in: when the tide ebbed, the rope broke, and the ship in consequence fell over and bilged, and the goods were damaged: it was held that this was a stranding within the meaning of that word in the policy; and that negligence of the crew does not discharge the underwriters, if the loss is occasioned by one of the perils insured against. In *Carruthers* v. *Sydebotham*, 4 M. & S. 77, where a ship

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being under conduct of a pilot, in her course up the river to Liverpool, was, against the advice of the master, fastened at the pier of the dock basin by a rope to the shore, and left there, and she took the ground, and, when the tide left her, fell over on her side and bilged, in consequence of which when the tide rose she filled with water, and the goods were wetted and damaged: it was held that this was a stranding to entitle the assured to recover for an average loss upon the goods. So, in *Fletcher* v. *Inglis*, 2 B. & Ald. 315, where a transport in government service, insured for twelve months, was ordered into a dry harbour, the bed of which was hard and uneven, and on the tide leaving her she received damage by taking the ground: it was held that this was a loss by a peril of the sea. And in *Phillips* v. *Barber*, 5 B. & Ald. 161, where, in an action on a policy of insurance on ship, in the usual form, for twelve months, at sea and in port, the loss averred was as follows; that, the ship having arrived at the harbour of St. John's, and discharged her cargo, it became necessary to place her, and she was accordingly placed, in a graving-dock there, to be repaired, and near to a certain wharf in the graving-dock; and that, whilst she was there, by the violence of the wind and weather, she was thrown over on her side, whereby she struck the ground with great violence, and was bilged &c.: it was held that this was a loss within the general words

weather in port; and it seems to me therefore to have been produced by a peril ejusdem generis with those specified, and to fall within the general words of the policy." Here, the ship was in a situation to prosecute her voyage, when, by the unexpected failure of the usual and ordinary mechanical means used for bringing her out of the dock in which her repairs had been done, she was lost. That clearly was a loss within the terms and meaning of the policy.

Sir W. Follett (*R. V. Richards* was with him) for the defendant.—The right of the plaintiff to recover in this action mainly turns upon two questions—first, whether, under the circumstances stated in the special case, the policy ever attached—secondly, supposing it had, whether the loss was occasioned by one of the perils against which the defendant undertook to insure the plaintiff.

I. The first question in effect resolves itself into two—one, whether the plaintiff's interest is properly described as *freight*—the other, whether there had been any inception of the risk. I. The policy never attached.

1. Upon the first of these points, *Flint* v. *Flemyng*, 1 B, & Ad. 45, is relied on to shew that the presumed additional value imparted to goods by their carriage by the owner of them in his own ship, is well described in a policy by the name of *freight*. If the court feel themselves bound by that decision, it would be an idle waste of time to argue the point. Such a construction, however, it must be observed, places the underwriter very much at the mercy of the ship-owner. 1. As to the plaintiff's interest in the subject-matter.

2. As to the inception of the risk.—It was formerly held that a policy on freight did not attach until the goods by the carriage of which the freight was to be earned, were actually on board: but subsequent decisions have held, that, where there is a contract for the shipment of the goods, under which the owners (of the goods) would be 2. As to the inception of the risk.

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liable in damages if the goods were not shipped, that constitutes an insurable interest in freight upon which a policy may attach. To entitle the assured in a policy on freight to recover for a loss, it must appear that the ship was in the act of earning freight at the time the accident happened; that she was in the place where the goods were to be received on board; and that she was in a fit state to receive them. In the present case, not only were the goods not on board, but the ship was not in a condition to take them. It appears that she was unseaworthy at the time she arrived at Bourbon; that she could not be sufficiently repaired at that place, and consequently sailed thence for India in an unseaworthy state; that, while passing near Ceylon, she met with a fresh accident, by striking violently two or three times on a bank; that, on her arrival at Coringa, it was found necessary to take her into dock; that the accident that destroyed her happened whilst she was in the dock. Upon these facts, the question arises, whether, no goods being on board, and the vessel not being in a condition to receive them, the underwriters are liable upon a policy on freight, simply because goods were ready to be put on board so soon as the vessel should be ready to take them. The cases bearing upon this point may be separated into two distinct classes—one, where there was no charterparty—the other, where there was one.

It is difficult to distinguish the principle of the decision in *Tonge* v. *Watts*, 2 Str. 1251, from the present case: the ground upon which that case turned was, that the ship *had not begun to earn freight*. In *Forbes* v. *Aspinall*, 13 East, 323, Lord Ellenborough said: "To recover in any case upon a policy on freight, it is incumbent on the assured to prove, that, unless some of the perils insured against had intervened to prevent it, some freight would have been earned; and, where the policy is open, the actual amount of freight which would have been so earned,

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limits the extent of the underwriter's liability. In every action upon such a policy, evidence is given, either that goods were put on board, from the carriage of which freight would result, or that there was some contract under which the ship-owner, if the voyage were not stopped by the perils insured against, would have been entitled to demand freight: and, in either case, if the policy be open, the sum payable to the ship-owner for freight, together with the premiums of insurance and commission thereupon, is the extent to which the underwriters are chargeable." And, speaking of *Montgomery* v. *Eggington*, 3 T. R. 362, which is relied on by the plaintiff, his lordship says: "The grounds of this decision do not appear: whether it proceeded upon a distinction between valued and open policies, is not expressly stated: and it might be that upon an *open* policy in such a case, Lord Kenyon and the court might have thought that the assured would have been entitled to recover in respect of the freight on the goods on shore, as well as for the freight of those that were actually put on board. There might be circumstances in that case which would have entitled the ship-owner to full freight, had the owners of the goods on shore refused to let them be shipped, and the ship had sailed with that part only which she had on board: there might have been a contract for giving the ship a full loading; or it might have been considered (though it is difficult to suppose that it was), that, as the residue of the goods to complete a cargo was ready to be shipped, and lying on the quay for the purpose, it was the same to the assured as if they really had been shipped. If that case, however, is to be considered as having decided, that, upon a policy estimating the freight upon a *full* cargo at 1,500*l*., a loss by a peril insured against may be recovered to that extent, when a third only of a cargo is obtained, and freight to the amount of such third could only have been earned, and when it was uncertain whether more ever could have been

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procured; we should pause long before we allowed ourselves to adopt such a ground of decision: we should hesitate extremely before we should say that 1,500*l.*, the calculated amount of the whole intended risk, should be paid for a loss of 500*l.* incurred in respect of a third of the intended risk; in other words, that *a total* loss should be paid for a loss of *only one third* of that which the parties to the insurance contemplated as *the whole subject insured.* It is sufficient, however, to say that that case is distinguishable from this in many of its circumstances. There, a full cargo was ready to be laden, *and the ship is a state ready to receive it,* and nothing but the perils insured against did, or (as it appears) could prevent its being received: here, it was uncertain whether any additional cargo could have been ever procured, and the outward cargo must also have been discharged before the homeward cargo could have been completed: so that the ship was not ever in a condition to receive her homeward cargo, if the cargo had been ready, which it never was, to have been put on board." If a ship be lost on her voyage out, could it be said that the policy on homeward freight had attached? To that extent the court must go unless they hold that the ship must be in a state of complete and perfect readiness to receive the homeward cargo. In *Palmer* v. *Marshall,* 8 Bing. 79, 1 M. & Scott, 161, Tindal, C. J., says: "The policy was *at and from* Bristol to London. and, though there are excepted cases in which the risk would not attach on such a policy until the time of sailing, as, where a ship is not finished, or is undergoing a course of repair at the time the policy is effected, yet here, where the vessel was lying in port, complete and ready for sea, the risk on the policy could only commence from its date." And Bosanquet, J., says: "In policies at and from a given place, the risk attaches while the vessel is at the place, unless in certain excepted cases, of which this is not one. The risk here attached on the vessel as long as she was at

Bristol. *Williamson* v. *Innes* was a policy on freight, which could not take effect till the cargo was on board." In that case (*Williamson* v. *Innes*, 1 M. & Rob. 88, 8 Bing. 81, n.), the policy was on freight at and from Algoa Bay and Table Bay, both or either, to London. Lord Lyndhurst, C. B., told the jury, that, if the ship was in a condition to begin to take in her homeward cargo [it was admitted that the cargo was ready], the plaintiff was entitled to recover." In *Forbes* v. *Cowie*, 1 Camp. 520, Lord Ellenborough says: "The underwriter does not insure that the ship shall have a freight, but only that the owner shall be indemnified for the loss of the freight of goods put on board." The vessel must at least be *at* the place with some reference to the voyage contemplated. If the vessel be there for another purpose —as in this case, shut up in a dry dock to repair the consequences of an accident not happening in the prosecution of the voyage insured—the policy does not attach. *Camden* v. *Cowley*, 1 W. Blac. 417, was the case of a policy on *the ship*, not on *freight*. In *Sellar* v. *M'Vicar*, 1 N. R. 23, a policy was effected on freight valued at 500*l.* on a voyage at and from Demerara, Berbice, and the Windward and Leeward Islands, to London: the ship being at Demerara, an agreement was entered into by the master with a house there, for a freight from Berbice to London, the cargo to be put on board at Berbice, and the ship to take a cargo of bricks and planks from Demerara to Berbice, and deliver them there; while proceeding from Demerara to Berbice with the bricks and planks on board, she met with an accident, and in consequence never earned her freight: and it was held that this was not a loss within the policy. These cases all support the authority of *Tonge* v. *Watts*, to this extent at least, that the ship must have begun to earn freight before there can be said to be any inception of the risk.

Sellar v. *M'Vicar.*

Thompson v. *Taylor*, 6 T. R. 478, is the leading authority among that class of cases where the freight which is the

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subject of the insurance is payable under a charterparty. There, the policy was on freight "at and from London to Teneriffe, at and from thence to any of the West India Islands (Jamaica excepted), and at and from thence to the bay of Honduras;" and the voyage in respect of which the freight was to be paid had been commenced, which the court held distinguished the case from *Tonge* v. *Watts*. *Horncastle* v. *Suart*, 7 East, 400, was decided upon the authority of *Thompson* v. *Taylor*: and Lord Ellenborough said, "it was clear that the underwriter was liable, upon the authority of *Thompson* v. *Taylor*: the voyage having commenced in which the freight was to be earned according to the terms of the charterparty, which made it *one entire contract*, and which voyage was insured by the policy." Speaking of the case of *Horncastle* v. *Suart*, Lord Ellenborough says, in *Forbes* v. *Cowie*, 1 Camp. 520: "There, there was one charterparty for the outward and homeward voyage, and the freight was entire. That is the only ground upon which the decision can be sustained." In *Davidson* v. *Willasey*, 1 M. & S. 313, where a ship was chartered from Liverpool to Jamaica, there to take on board a full cargo for Liverpool at the current rate of freight; and the ship-owners effected a valued policy on the freight at and from Jamaica to her port of discharge in the united kingdom; and the ship arrived at Jamaica, and, after taking on board one half of her cargo, was lost by storm, the remainder of the cargo being on shore and ready to be shipped: it was held that the assured were entitled to recover as for a total loss. Littledale, for the plaintiffs, there observed: "The case of *Forbes* v. *Aspinall*, where the policy was held only to cover the freight upon such part of the cargo as was on board at the time of the loss, is obviously distinguishable; inasmuch as in that case there was no charterparty or contract under which the ship-owner, except for the perils insured against, would have been entitled to demand freight." Upon which Lord Ellenborough remarks: "The distinc-

tion between this case and *Forbes* v. *Aspinall* has been truly stated, and is a clear one; there, there was no charterparty, and the valuation on the policy was made with reference to freight upon all the goods intended to be carried on the voyage insured, a part only of which goods was lost, and the rest never were or might have been obtained; so that the loss was not total within the meaning of the valuation: but here the valuation is made with reference to the freight under the charterparty, the whole of which the plaintiffs have been prevented from earning by one of the perils insured against." Le Blanc, J., says: "In the case of *Forbes* v. *Aspinall*, it was attempted to carry the prior cases further, and to make the underwriter liable for a total loss, where there was no contract under which the assured could have demanded freight, and where several contingencies might have intervened to deprive the party of his full freight, if the loss had not happened." And Bayley, J.—"The question is, to what extent the assured have been damnified by one of the perils insured against; for, to that extent they are entitled to an indemnity. It appears to me that they must be considered either as having lost the benefit of taking on board a full homeward cargo, which would have entitled them to their full freight under the charterparty, or of fixing the freighters if they had refused to complete their loading, with damages to the full amount of the full freight; and I consider that the same as freight." That is a fair criterion to apply to all the cases—is the owner in a condition to fix the freighter if he refuse to complete the loading? The principle upon which *Truscott* v. *Christie*, 2 B. & B. 320, 5 Moore, 33, rests, is decidedly in favour of the defendant. There was clearly an inception of the risk there before the loss happened. "Something was done," as was observed by Dallas, C. J., "in part performance of the contract, which was not matured, because prevented by the perils of the seas; there was therefore a clear inception of the risk." There is nothing in that case

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to impugn the general rule, that the ship must be in a condition to receive the goods on board, and to commence the voyage. The very elaborate judgments delivered in that case would have been altogether unnecessary, if it were enough, as a general proposition, that the vessel should be at the place of loading, and the goods there, ready to be put on board. *Warre* v. *Miller*, 7 D. & R. 1, 4 B. & C. 538, was a question of deviation. Whether or not the owner had at the time of the loss (the 14th August, 1831) an inchoate right to freight, must depend upon whether or not the ship was in a fit condition and proper place to receive her cargo. If the home freight had been contracted for with a merchant at the place, and the situation of the parties such, on the day named, that the owner might have maintained an action against the freighter for not providing a cargo, then undoubtedly the policy would have attached; otherwise not.

II. The loss not occasioned by a peril insured against.

II. The loss was not occasioned by any one of the perils insured against. "The perils which the assurers were contented to bear were of the seas, &c., and all other perils, losses, and misfortunes that had or should come to the hurt, detriment, or damage of the said goods and merchandizes, and ship, or any part thereof." That means perils ejusdem generis; it does not extend to cover a loss like this, happening to the vessel in a dry dock in which she lay without any reference to the voyage to which the policy was intended to apply, and occasioned by the failure of some part of the process by which she was to be brought out of the dock and placed in a situation to receive her cargo. In *Thompson* v. *Whitmore*, 3 Taunt. 227, the ship was insured for six months at and from and to all ports and places whatsoever and wheresoever, at sea and in port; the ship being hove down on a beach within the tide-way for the purpose of repair, was bilged and damaged; and it was held that this was not a loss occasioned by the perils of the sea. In *Fletcher* v. *Inglis*, 2 B. & A. 315, the injury

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sustained by the ship was the immediate result of the action of the tide upon her. In *Phillips* v. *Barber*, 5 B. & A. 161, the loss was expressly averred to have been occasioned by the violence of the wind and weather: that case, therefore, is no authority for the position that the underwriter is liable for a loss occurring whilst the ship is in dock undergoing repair, by means wholly unconnected with perils of the sea. In *Hodgson* v. *Malcolm*, 2 N. R. 336, Sir James Mansfield differed from the rest of the court, considering the loss not to be one that the underwriters ought to be held liable for. *Carruthers* v. *Sydebotham* and *Bishop* v. *Pentland* were cases of stranding, and have no application here. In the present case, the loss was in no degree the result of any agency of the winds or waves, but was occasioned solely by the negligence and want of skill of the natives who were engaged in the curious process described in the special case.

Wilde, Serjeant, in reply.—If but for the loss, the vessel would have earned freight, the plaintiff's interest was an insurable one. The fact of the goods being his own, rather tends to strengthen his right: nothing but the happening of one of the perils insured against could in that case deprive him of the profits to be made of his ship. Whether an interest of that description could be recovered upon a policy on freight, was not treated as a new question in *Flint* v. *Flemyng*: in *Forbes* v. *Aspinall* and *Forbes* v. *Cowie*, the plaintiffs were in like manner both owners of the ship and owners of the goods.—Here the plaintiff has, beyond a doubt, lost the benefit of the subject-matter of the insurance by the intervention of one of the perils insured against. In *Curling* . *Long*, 1 B. & P. 634, Eyre, C. J., says: "The inception of freight is breaking ground. In the law of insurance, indeed, this doctrine is not holden so strict, for, there, if the goods be so situated as to create a well-grounded expectation of freight being earned, it is decided

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that the freight is insurable and recoverable." And Heath, J., says: "The mere hope or expectation of interest is sufficient to entitle the assured in a policy of insurance to recover against the underwriters." *Truscott* v. *Christie*, is a distinct authority for the plaintiff: the ground of the decision there was that there was a strong probability of freight being earned. All that the cases require, is, a contract binding some one to ship goods, or a reasonable expectation of obtaining freight, that the ship shall be in the course of prosecuting the adventure, and that the loss shall be occasioned by a peril insured against. In *Sellar* v. *M'Vicar*, 1 N. R. 23, the loss happened, not whilst the vessel was engaged in prosecuting the homeward voyage, but whilst she was carrying a distinct cargo from Demerara to Berbice. Here, the loss happened whilst the vessel was passing from one part of the harbour to another for the purpose of prosecuting her voyage: and it does not follow that the underwriters are discharged because the accident may have been in some measure the result of negligence or want of skill.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court: This was an action on a policy of insurance dated the 27th August, 1831, lost or not lost, at and from Calcutta, "or any port or ports, place or places, all or any, and in any sucession, on the Coromandel coast, to any port or ports, place or places in Bourbon, upon any kind of goods or merchandize, &c., in the good ship or vessel called the La France." And the policy was declared to be "on 1,000*l.* on the freight of the said vessel, valued at 1,000*l.*" The declaration avers that the ship was in good safety at Coringa, and "that divers goods and merchandizes, amounting to a full cargo of the said ship or vessel, which had been bought, procured, and contracted for, for and on account of the said person so interested in the subject-matter of

insurance as aforesaid, were at Coringa aforesaid for the purpose of being shipped and loaded, and which, had it not been for the loss hereinafter mentioned, would have been shipped and loaded in and on board of the said ship or vessel, to be carried and conveyed therein on the said voyage in the said policy of assurance mentioned, to wit, from the Coromandel coast to Bourbon aforesaid." And the declaration then proceeds to aver " that the said ship or vessel was broken, damaged, and destroyed, and rendered wholly incapable of pursuing the said voyage, by certain perils which the said assurers by the said policy did take upon themselves, to wit, by the accidental breaking and giving way of the tackle and supports whereby the said ship or vessel was supported, in being moved from a certain dock; in consequence of which breaking and giving way, the said ship or vessel struck violently against the sand, and was bilged, broken, destroyed, damaged, and rendered incapable of pursuing the said voyage; and the said ship or vessel, and the freight, and all benefit, profit, and advantage that the said person so interested as aforesaid would otherwise have derived and acquired from the employment of the said ship or vessel in the carrying of the said goods and merchandizes on the said voyage, and the means of carrying and conveying the same, were by the means aforesaid wholly lost."

The defendant by his second plea traversed the allegation, " that, at the time of the loss in the declaration mentioned, the risk in the said policy mentioned had commenced, and the said writing or policy of assurance had attached;" upon which issue is joined. By the third plea, he alleged " that the ship was not, at the time of the commencement of the risk insured against by the said policy, seaworthy;" upon which also issue was joined. By the fourth plea, he traversed the allegation " that the ship was broken, damaged, and destroyed, and rendered incapable of pursuing the voyage, by any perils which the said

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assurers by the said policy did take upon themselves;" and, by the fifth plea, he traversed "that the ship was at any time after the making of the policy, and before the loss, in good safety at any port or place on the Coromandel coast in the said policy mentioned;" on each of which traverses respectively also issue was taken.

Such being the state of the pleadings, two main and principal objections against the plaintiff's right to recover any loss on this policy, have been raised and argued before us—first, that, under the facts stated in this special case, the policy on freight never attached—secondly, that, supposing the policy to have attached, there was no loss within the policy by any of the perils therein insured against.

I. The policy attached.

I. The first objection involves two distinct and separate heads of consideration—first, whether the interest of the assured in the subject-matter of insurance is properly described in the policy as freight—secondly, if such description is sufficient in the policy, then, whether the interest of the assured in the subject-matter of the insurance had commenced before the loss happened.

1. Subject-matter of insurance properly described as *freight*.

1. But we consider the first question to be set at rest by the decision of the court of King's Bench in the case of *Flint* v. *Flemyng*, 1 B. & Ad. 45; and hold it to be now established law, that the assured under an insurance upon freight, may recover the profits expected to be made by carrying their own goods in their own ship upon the voyage insured.

2. Interest commenced.

2. The second head of inquiry may be subject to some degree of doubt and difficulty; but, upon the whole, we concur in opinion, that, under the circumstances stated in the case, the interest of the assured had commenced, and the policy had attached at the time the loss took place.

The argument which has been mainly relied upon on the part of the underwriters, is this, that, in order to enable

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the assured to recover a loss upon a policy on freight, there must be a cargo either actually put on board or ready to be put on board under a contract for that purpose; and, in the latter case, the ship must also be ready to receive the cargo; and in this case it is contended by the underwriter, that, by reason of the loss of the ship before she was out of dock, and actually afloat, she was never in a condition or ready to receive the goods on board: the defendant relying on the expression used by Lord Ellenborough in giving the judgment of the court of King's Bench in *Forbes* v. *Aspinall*, 13 East, 331, that, in order to recover on a policy on freight, a full cargo must be ready to be shipped, and the ship must be in a condition to receive the cargo. The proposition that the ship must be ready to receive her cargo, had in that case an immediate bearing and application to the facts then before the court; for, the policy was on freight upon the homeward veyage, and the homeward cargo was to be made by barter of the outward cargo, and the whole of the outward cargo had not been bartered at the time of the loss, part of it being still on board, so that it was impossible under those circumstances that the homeward cargo could be received on board the ship at the time of her loss. In that case, therefore, the loading of the homeward cargo on board, upon which depended the attaching of the policy, and the commencement of the right of the assured to the freight, was not prevented by any of the perils insured against by the policy, as the proximate and immediate cause of such prevention, but by a cause altogether without the risks included in the policy, namely, by the inability of the ship to receive the cargo on board, by reason of her being then partly loaded with the outward cargo: whereas, in the case now before us, it appears that the ship was on the 14th August quite ready to go to sea and to receive the cargo on board, that nothing remained to prevent her sailing but the getting her out of dock, and that the loss of the

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ship, and consequent inability to receive the cargo, was occasioned solely by the endeavour to get her out of the dock, and afloat in the river. If, therefore, the loss of the ship in this case was occasioned by any of the perils within the meaning of the policy, the case is distinguishable from that of *Forbes* v. *Aspinall*, in this, that the immediate cause of prevention of taking the goods on board was not occasioned by the inability of the ship to receive the cargo, but by the ship being disabled to receive the cargo, by one of the perils insured against. For, so far as relates to the cargo, we think it must be considered as in a sufficient state of readiness to be put on board; it was purchased by the assured for the express purpose of the adventure mentioned in the policy: it was comparatively useless for any other purpose: and the whole of the purchase was completed before the repairs were finished; and, although it had been deposited in warehouses at seven miles distance, yet it was deposited there for the purpose of being put on board; and it is impracticable, as it appears to us, to lay down any precise rule as to the distance within which the cargo must be from the ship at the time of the loss, whether close to it, upon the quay, as in *Flint* v. *Flemyng*, 1 B. & Ad. 45, or at a more considerable distance, as in the present case. All that it seems necessary to determine with respect to the cargo, being, that it must have become the property of the parties insured, by a contract made with a view to its being sent on board, and actually in a state of readiness, reference being had to the nature and description of the voyage insured, to be put on board, when the ship arrives at the place of deposit.

Cargo in a sufficient state of readiness.

II. The point remaining to be considered, is, whether the loss was occasioned by any of the perils insured against by the policy. It is to be observed that the words in the policy are very large: the policy not only enumerates "perils of the sea," but "all other perils, losses, and misfortunes, that had or should come to the hurt, detriment,

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or damage of the subject-matter of the insurance." And the cases cited and relied upon by the plaintiff—*Carruthers* v. *Sydebotham*, *Fletcher* v. *Inglis*, and *Phillips* v. *Barber*—are sufficient to shew that a loss occasioned by the endeavour to get the vessel afloat from the dock in which she had just been repaired, was a loss within the policy. Indeed, the difficulty which has arisen upon this point in former cases has rather turned upon the question whether such a loss was properly described in the declaration as a loss by perils of the sea, than to any doubt as to its falling within the general terms of the policy; and in the present case that difficulty is avoided by the mode in which the loss is described in the declaration.

As to the other issues.

We do not feel ourselves called upon to enter into the question of sea-worthiness, under the third issue, or the safety of the ship under the fifth; because, the objection of the want of sea-worthiness has been virtually, and we think properly, upon the facts stated in the case, abandoned in the course of the argument: and, as to the fifth issue, no point was made before us. But we think, upon the two main points which have been argued before us, the plaintiff is entitled to our judgment, and direct the verdict to be entered acordingly.

Judgment for the plaintiff.

IZON *v.* GORTON and Another.

Wednesday, May 8th.

The defendants were tenants from year to year to the plaintiff of the upper floors of a warehouse, at a rent payable quarterly; the premises were destroyed by an accidental fire in the middle of a quarter, and were wholly untenantable until rebuilt about seven months after:—Held, that the relation of landlord and tenant between the parties was not determined by the destruction of the premises, but that the defendants remained liable for rent until the tenancy should be in the usual manner put an end to; and that such rent was recoverable in assumpsit for use and occupation.

THE first count of the declaration was for the use and occupation of certain rooms, apartments, and premises of the plaintiff, and the second for money due from the de-

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fendants to the plaintiff on an account stated. The defendants pleaded non assumpsit, except as to 10*l.* 10*s.*, and as to that a tender and payment into court.

At the trial before Tindal, C. J., a verdict was found for the plaintiff for 109*l.* 10*s.*, being the amount claimed, after deducting the sum tendered and paid into ceurt, subject to the opinion of the court upon the following case:—

The plaintiff was lessee for a term of years of a warehouse in the city of London, and occupied the ground-floor and cellar in his business of an ironmonger.

On the 23rd August, 1830, the defendants entered into the occupation of the two upper floors of the warehouse, as undertenants to the plaintiff, at a rent of 80*l.* per annum, which was paid quarterly, on the usual quarter days, and continued in the actual occupation of such rooms, by using them as a warehouse for hops, from that time until the 12th November, 1834, when the floors were consumed by fire. During their occupation, the roof, which was the only covering to the upper floor occupied by the defendants, was occasionally repaired by the plaintiff, when repair was necessary. There was a crane and jib on the upper floor occupied by the defendants, used for the purpose of raising goods to the defendants' rooms, and also used by the plaintiff when he had occasion. That crane and jib were also repaired by the plaintiff at the instance of the defendants, who on one occasion refused to pay their rent until such repairs were done. The plaintiff also paid all rates and taxes.

Premises destroyed by fire.

On the 12th November, 1834, a fire accidentally broke out in the night in the rooms occupied by the defendants, by which the whole of their stock was destroyed, and the rooms were so damaged that they became altogether untenantable. The plaintiff had insured the whole house of which the rooms in question were part. From the time of the fire there was no occupation in fact by the defendants of the premises, and no interference with them for any

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purpose. The plaintiff after some delay proceeded to repair the premises, and apprised the defendants that the rooms were ready for use and occupation by the 4th June, 1835. The defendants, however, declined to occupy the premises or to pay any rent subsequently to the fire; and the plaintiff let the premises to another tenant at Lady-day, 1836, by consent of the defendants.

The question for the opinion of the court was, whether, under the circumstances above stated, the plaintiff was entitled to recover from the defendants for the use and occupation of the rooms and premises in question, for the period that elapsed between the 12th November, 1834, when the fire happened, and the 25th March, 1836. Question.

If the court should be of opinion that the plaintiff was entitled to recover for the use and occupation of the said rooms for the whole of the last-mentioned period, then the verdict was to stand for the sum of 109*l.* 10*s.* And, if the court should be of opinion that the plaintiff was entitled to recover from the defendants for the use and occupation of the said rooms and premises for any part of the last-mentioned period, the judgment was to be entered up for the plaintiff for a sum estimated at the rate of 80*l.* a year, and in proportion to the period for which the court should think the plaintiff so entitled to recover: but, if the court should be of opinion that the plaintiff was not entitled to recover from the defendants for any part of the period aforesaid, then a verdict was to be entered for the defendants, or a nonsuit, as the court might direct.

The case was argued in Hilary Term last.

Peacock, for the plaintiff.—The interest of the defendants as tenants from year to year was not determined by the fire—*Brown* v. *Quilter*, Ambler, 619, 1 T. R. 708, n.; and they are liable, notwithstanding the fire, to rent during the whole period mentioned in the case, or at all events for rent accruing from the 4th June, 1835, when the rooms

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were ready for occupation, down to the 25th March, 1836, when the tenancy was put an end to by the plaintiff's letting the premises to a stranger. In *Baker* v. *Holtpzaffell*, 4 Taunt. 45, it was held that the landlord of premises demised under a written agreement, may recover against his tenant in an action for use and occupation the rent accruing after the premises are burnt down, and no longer inhabited by the tenant. Sir James Mansfield there says: "The land was still in existence, and there was no offer on the part of the defendant to deliver it up. The landlord could not enter to rebuild; the tenant might have rebuilt the premises if he had so pleased, and occupied them at any time within the term; he therefore must be taken still to hold the land, which is sufficient to satisfy the words of the statute"—11 Geo. 2, c. 19, s. 14. And Heath, J., says: "The defendant might have rebuilt at any period of the term; whereas the landlord would have been a trespasser if he had entered for that purpose, which shews that the former held the land." So, here, there was no offer on the part of the defendant to discontinue the tenancy. [*Tindal*, C. J.—The plaintiff here had the land: the defendants had nothing tangible to give up.] The late fire in the Temple dispossessed many persons who had separate and independent interests, freehold and otherwise, in the various floors of the buildings destroyed: could that event enable the owners of the soil to destroy those several interests? The plaintiff was at least entitled to rent to the end of the current year—Christmas, 1834. In *Mollett* v. *Brayne*, 2 Camp. 103, Lord Ellenborough held that a yearly tenant who quits in the middle of a quarter under a verbal license from the landlord, is bound to pay rent to the end of the year. So, a surrender in the middle of a quarter destroys the right to rent for the whole or any part of the current quarter—*Grimmann* v. *Legge*, 2 M. & R. 438, 8 B. & C. 324. [*Tindal*, C. J.—Unless the happening of the fire puts an end to the contract, I cannot

see that it operated otherwise than as a notice to determine the tenancy at the end of the current year.] If that be so, the plaintiff is entitled to the full sum claimed. The defendants were guilty of permissive waste, for which before the statute 6 Anne, c. 31, s. 6, they would have been liable to an action—1 Wms. Saund. 323 *a.*, n. (7). But though the statute of Anne relieves the tenant from an action, it neither dissolves the tenancy nor exempts the tenant from the payment of rent. In *Holtzapffel* v. *Baker*, 18 Ves. 115, it was held that there is no equity in favour of a lessee of a house, liable to repair with the exception of damage by fire, for an injunction against an action under the contract for payment of rent upon the distruction of the house by fire. "Really," says Lord Eldon, "I cannot perceive the equity in this sort of case. Suppose a demise for seven years at a rent of 100*l.* per annum, the tenant to repair in all cases except fire, not to be liable in that case, and the landlord stipulating, that, in case of fire, he will be content at the end of seven years to take the land without the house; if they choose to make that agreement, why should they not? These parties have made that agreement. If it can be maintained that the meaning of this contract is, that, if a fire should happen, the rent shall not be paid, there is no occasion to come into equity: but, if that is not the effect of the contract at law, I cannot see any equity."

Tomlinson, contrà.—It may be conceded, that, had this been the case of a *lease*, the defendants would have been bound by their express covenant to pay rent. In the case of an express contract, the parties speak in their own language: but, where there is no express contract, the court will imply a contract on the part of the defendant merely co-extensive with the consideration. This, however, is not the case of a demise: the action is for use and occupation—an action given by the statute 11 Geo. 2, c. 19,

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s. 14, to enable the landlord "to recover a reasonable satisfaction for the lands, tenements, or hereditaments, held or occupied by the defendant, for the use *and* occupation of what was so held or enjoyed." To entitle the landlord to maintain the action, there must be an occupation in fact, or a continuing power in the tenant to occupy, and a continuing exclusion of the landlord. Here, the entry by the landlord for the purpose of re-building the premises determined the tenancy; and the defendants could only be liable in respect of some new contract. In *Naish* v. *Tatlock*, 2 H. Blac. 319, where a tenant from year to year of a house at a yearly rent, became bankrupt in the middle of a year, and his assignees entered and kept possession for the remainder of the year; it was held that the lessor could not maintain an action for use and occupation against the assignees for the bankrupt's occupation as well as their own, without proving their special instance and request for the bankrupt to occupy during the time that had elapsed before the bankruptcy. Eyre, C. J., says: "Under the statute, a landlord who has rent owing to him is allowed to recover, not the rent, but an equivalent for the rent, a reasonable satisfaction for the use and occupation of the premises which have been holden and [*held or*] enjoyed under the demise, by the action for the use and occupation; and it is provided on his behalf, that, if the demise be produced against him, it shall not defeat his action, as it would have done before the statute; but the fixed rent shall only be used as a medium, by which the uncertain damages to be recovered in this form of action shall be liquidated. What is given by this statute? A reasonable satisfaction for the use and occupation is the thing intended to be given; the form of action marked out (being enlarged by a necessary construction, so as to be allowed to be maintained without an express promise) is the proper form in which such reasonable satisfaction is to be recovered; but the reasonable satisfaction, which in its own nature must apply to

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something specific, by which it can be estimated, being here given for use and occupation, and for nothing else, it is a remedy which in its own nature is not co-extensive with a contract for rent; nor does it seem to have been within the scope and purview of the act to make this remedy co-extensive with all the remedies for the recovery of rents claimed to be due by the mere force of the contract for rent. *The statute meant to provide an easy remedy in the simple case of actual occupation, leaving other more complicated cases to their ordinary remedy.*" In *Whitehead* v. *Clifford*, 5 Taunt. 518, Gibbs, C. J., says: "The action for use and occupation depends either upon actual occupation, or upon an occupation which the defendant might have had, if she had not voluntarily abstained from it. Here, the plaintiff himself takes possession of the house, and makes the profit of the premises; and it was therefore impossible for the defendant during the same time to have used and occupied the premises, if she would." So, in the present case, from the time the fire consumed the premises until they were rebuilt, at all events, the defendants could have no enjoyment of the premises. In *Richardson* v. *Hall*, 1 B. & B. 50, 3 Moore, 307, Dallas, C. J., says: "This is an action given by the statute for use and occupation. The use and occupation is made the measure of the damages, and the plaintiff can only recover to the extent of the occupation proved." Parke, B., in delivering the judgment of the court of Exchequer in *Nation* v. *Tozer*, 1 C. M. & R. 172, refers the decision of this court in *Baker* v. *Holtpzaffell* to its true foundation. He says: "In order to support this action for use and occupation, it is necessary that the land should have been occupied by the defendant, his agents, or under-tenants, during the time for which the compensation is claimed for use and occupation, though it need not have been beneficially, or even *actually* so enjoyed; but the defendant might have taken possession, and continued to

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have the right of actual occupation, whenever he pleased to take it. In *Baker* v. *Holtpzaffell,* there was an occupation by the lessee till the premises were burned down, and then as much occupation as the lessee chose to make use of." (122) In *How* v. *Kennett,* 3 Ad. & E. 659, 5 N. & M. 1, it was held that assumpsit for use and occupation cannot be maintained against trustees to whom a termor assigns his goods, estate, and effects, for the benefit of his creditors, unless they have *actually occupied,* although the assignment be sufficient to vest the term in them unless disclaimed, and they do not disclaim. In *Baker* v. *Holtpzaffell,* there was (as appears from the report in 18 Vesey, 115,) an express contract to pay rent, as well as to keep the premises in repair; the exception as to damage by fire was confined to the covenant to repair. Besides, it was a demise of a whole house; and, though the house was destroyed, the land remained: here, however, nothing remained after the fire that was susceptible of occupation, nothing that could be given up. That case would have been in point had the fire here been confined to the upper floors of the house. [*Bosanquet,* J.—In *Pinero* v. *Judson,* 6 Bing. 206, 3 M. & P. 497, it was held that assumpsit for use and occupation lies for constructive as well as actual occupation.] There the tenant *held,* and, but for his own default, he might have occupied. Here, the tenants had no such power; neither were they in a situation to rebuild or to compel the landlord to rebuild the premises. It has repeatedly been held that a man is not liable for the occupation of premises that are in so dilapidated a state that there can be no beneficial occupation of them—*Edwards* v. *Hetherington,* R. & M. 268, 7 D. & R. 117; *Collins* v. *Barrow,* 1 M. & Rob. 112; *Salisbury* v. *Marshall,* 4 C. & P. 65. [*Tindal,* C. J.—In those cases, the inability in the tenant to occupy was occasioned by the default of the landlord—almost amounting to an eviction.] So, here, the entry by

(122) "In the case of the house burnt down, there was still an occupation *of the land.*" Per Park, J., in Richardson v. Hall, 1 B. & B. 55.

the landlord for the purpose of rebuilding, accompanied with exclusive possession, amounts to an eviction. [*Tindal*, C. J.—By the payment into court, the defendants admit their liability for the use and occupation of the premises down to the end of the quarter.] The subsequent taking possession by the landlord clearly destroyed his right to rent that otherwise might have accrued since the fire.

Peacock, in reply.—This action is maintainable so long as the tenant's interest subsists; and that was not destroyed in this case by the fire. In *Naish* v. *Tatlock* and *Richardson* v. *Hall*, the form of action was misconceived: here, use and occupation is the only form of action that could under the circumstances be maintained. [*Tindal*, C. J.—You would contend that trespass might be maintained by a first-floor freeholder against the owner of the lower floor for carrying up his story (on rebuilding) higher than it originally was?] Decidedly. [*Tindal*, C. J.—Probably that is so; it would not be restoring the party ad idem: were it otherwise, the owners of upper floors might sometimes be raised to an inconvenient altitude.] One possessed of an upper floor has a right to the support of the lower walls of the house. In Viner's Abridgment, *House*, (F), it is said: "If a man has the upper rooms in a house, and another has the foundation and lower rooms, and the *upper rooms* are out of repair, the owner of the *lower rooms* shall have an action against him that has the upper rooms: and so it shall be vice versâ, for not repairing of the foundation." In Fitzherbert's Natura Brevium, 117, is a writ to a mayor to command him that has the lower rooms to repair *the foundation*, and him that has the garret, to repair *the roof* (123). This shews that the interest is not destroyed

(123) The authority Viner quotes is, Keilway, 98. b. pl. 4. In Tenant v. Goldwin, 6 Mod. 314, 1 Salk. 361, the court of King's Bench doubted the case in Keilway, and said that the writ in Fitz. Nat. Brev. 117, was founded upon *custom*. And see 1 Wms. Saund. 322, n. (1) to Pomfret v. Ricroft.

See Trower v. Chadwick, 3 Scott, 699, 3 New Cases, 334.

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by a fire. In *Richardson* v. *Hall*, the husband had neither the right to enjoy nor the actual enjoyment of the premises for a portion of the time in respect of which he was charged. In *Nation* v. *Tozer*, the question was whether the entry by one of two executors was sufficient to bind the other. In *Whitehead* v. *Clifford*, the landlord accepted possession in the middle of a quarter; which brings that case within the principle of *Grimmann* v. *Legge*. In *Edwards* v. *Hetherington*, *Collins* v. *Barrow*, and *Salisbury* v. *Marshall*, the premises were by the landlord's default rendered incapable of beneficial occupation. There is nothing upon the face of the special case whence the court can assume an eviction.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court: The defendants in this case being tenants from year to year to the plaintiff of the upper floors of a warehouse, at a rent payable quarterly, a fire broke out in the defendants' rooms accidentally, in the middle of a quarter: by means of which the floors were consumed, and the defendants' rooms so damaged that they became altogether untenantable until the plaintiff had completed their repair, after about seven months' interval from the time of the fire.

Two questions have arisen between the parties, upon this state of facts—first, whether the defendants are liable to the payment of any and what rent after the termination of the quarter which was current at the time of the fire (up to the end of which quarter the rent has been paid into court)—secondly, if liable to rent at all, whether it can be recovered in an action for use and occupation.

1. Relation of landlord and tenant not determined by the fire.

Upon the first point, we can see no legal ground for holding that the relation of landlord and tenant between these parties was determined by the consumption of the premises by fire. If there had been an agreement in writing between the parties for a term of years, no question

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could have been made but that the term of years still existed; and a tenancy from year to year, until it is determined by a notice to quit, is, as to its legal character and consequences, the same as a term for years. Upon the facts stated in this case, it must stand admitted that the tenancy was not determined by any regular notice to quit: and the case of *Baker* v. *Holtpzaffell*, 4 Taunt. 45, is a direct authority that a tenancy for a term under an agreement, not being an instrument under seal, is not determined by a fire during the continuance of the tenancy. We think, therefore, the defendants continued tenants to the plaintiff until such tenancy was put an end to by the plaintiff's letting of the premises to a stranger, viz. at Lady-Day, 1836, and that they are liable to rent up to that day.

2. As to the form of the action.

The remaining question is, whether the defendants are liable in this form of action. The statute 11 Geo. 2, c. 19, enables landlords "to recover a reasonable satisfaction for lands &c. held *or* occupied by the defendant, in an action on the case for the use and occupation of what was so held *or* enjoyed;" from which it seems to follow, that, if there is an actual *holding*, and the power to occupy or enjoy is given by the landlord to the tenant so far as depends on the landlord, the action is maintainable. Here, nothing was done by the landlord to take away the continuance of the occupation or enjoyment by the tenants: for, it would, as it appears to us, be unreasonable to hold that the landlord's act in replacing the floors, and repairing the walls of the defendants' rooms, amounted to an eviction: and, though in the case above cited, where it was held that the action for use and occupation would lie, some stress was placed by the court upon the fact that the land was still in existence, and there was no offer on the part of the defendant to give it up; so it might be argued in the present case; the space inclosed by the four walls still continued as marked out by them. If the landlord rebuilds, and the tenant chooses to re-enter, and to continue his occupation of the

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new building, there seems nothing to prevent him, as no notice to quit had been given on either side; and, if so, the obligation of each of the parties must be reciprocal, and the tenant must make satisfaction for the rent. The cases referred to in the argument, in which the tenant has been allowed to withdraw himself from the tenancy, and to refuse payment of rent, will be found to be cases where there has been either error or fraudulent misdescription of the premises which were the subject of the letting, or where the premises have been found to be uninhabitable, by the wrongful act or default of the landlord himself; neither of which circumstances occurs in the present case.

Upon the whole, we think the plaintiff is entitled to judgment for 109*l.* 10*s.*

Judgment for the plaintiff.

Wednesday, May 8th.

A patent was taken out for "new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances, by power;" and by the specification the invention was declared to consist of "*new machinery for macera'ing* flax and other similar fibrous substances previous to drawing and spinning it; and also of *improved machinery for spinning the same* after having been so prepared." The only alleged improvement in the spinning machinery was declared to be "placing the drawing rollers only two inches and a half from the retaining rollers," which was nearer than they had ever before been placed for the purpose of spinning flax. It appeared, however, that spinning machines were always so constructed, as, by means of slides, to allow the distance of the rollers to be varied according to the staple or fibre of the article to be spun; and that cotton had always been spun with a reach of less than two inches and a half:—Held, that this was not the proper subject of a patent, though the jury found that the invention was both new and useful; and consequently, that the specification, being void as to part, was void altogether.

KAY *v.* MARSHALL and Others.

THE following case was sent by His Honor the Master of the Rolls for the opinion of this court:—

About the year 1824, the plaintiff claimed to have found out and invented new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances, by power. The plaintiff thereupon applied for and obtained letters patent under the Great Seal of Great Britain, dated the 26th July, in the sixth year of the reign of George the Fourth, whereby, after reciting that the

plaintiff had by his petition represented unto his majesty that he, the plaintiff, had found out and invented new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances, by power, which invention he believed would be of much benefit and utility, and that he was the first and true inventor thereof, and that the same had not been made, done, or used by any other person or persons whomsoever to his knowledge or belief—it was thereby declared that his said majesty did, for himself, his heirs and successors, give and grant unto the plaintiff, his executors, administrators, and assigns, his majesty's special license that he the plaintiff, his executors, administrators, and assigns, and no others, from time to time and at all times thereafter during the term of years therein expressed should and lawfully might make, use, exercise, and vend the said alleged invention, &c.

Specification.

By a specification under the hand and seal of the plaintiff, dated the 26th January, 1826, and duly inrolled in his majesty's court of Chancery, the plaintiff, within six calendar months next after the date of the said letters patent, did, in pursuance of a proviso for that purpose contained in the said letters patent, particularly set forth, describe, and ascertain the nature of his said alleged invention, and the several parts thereof, and in what manner the same was to be performed; and, after setting forth and describing the same, declared that what he claimed as his invention in respect of *new machinery for preparing flax*, hemp, and other fibrous substances, were, the macerating vessels marked B in the plan or drawing annexed to the said specification, and the trough of water marked C: and that what he claimed as his invention in respect of *improved machinery for spinning* flax, hemp, and other fibrous substances, was, the wooden or other trough marked D for holding the rovings when taken from the macerating vessels, and the placing of the retaining rollers *e e* and the drawing rollers *c c* nearer to each other than they had ever before been placed,

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say, within two and a half inches of each other, for the purpose aforesaid.

In the language of the specification, the invention was declared to consist of "new machinery for macerating flax and other similar fibrous substances previous to drawing and spinning it, which is called the preparing it; and also of improved machinery for spinning the same after having been so prepared:" and the patentee, in describing the improved machinery for spinning, said that "he placed the drawing rollers only two and a half inches from the retaining rollers, and that this constituted the principal improvement in the said spinning machinery." Then he proceeded to assign the reason and principle upon which the alleged improvement rested; and in a later part of his specification (when stating the extent of what he claimed as his own invention in respect of improved machinery for spinning flax), he described it to be the wooden or other trough for holding the rovings when taken from the macerating vessels, "and the placing of the retaining rollers and the drawing rollers nearer to each other than they had ever before been placed, say, within two and a half inches of each other, for the purpose aforesaid."

Trial.

On the 2nd June, 1836, a trial was directed by the Master of the Rolls upon two issues—first, whether the plaintiff had before and at the time of the making of the said letters patent found out and invented any new and improved machinery, as in the letters patent and specification was alleged—secondly, whether the said alleged invention in the said letters patent and specification mentioned, was, before and at the time of the making of the said letters patent, of much or any public benefit or utility, as in the said letters patent was alleged. And the judge who tried the said cause was to be at liberty to indorse special matter on the postea as he should think fit.

The issues were tried at the York Assizes, 1836, before Parke, B.; and a verdict was found for the plaintiff on

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both issues, with the following indorsement on the postea:—

Indorsement on the postea.

That, before the granting of the patent, flax, hemp, and other fibrous substances were spun with machines with slides, by which the reach was varied according to the length of the staple or fibre of the article to be spun, and that that had been a fundamental principle of dry spinning known and used before the granting of the patent, the reach having varied in cotton spinning between $\frac{7}{8}$ths of an inch and $1\frac{1}{4}$ inch; in flax or line spinning, from fourteen to thirty-six inches; tow spinning, from four to nine inches; worsted spinning, from five to fourteen inches. Before the granting of the patent, it was not known that flax could be spun by means of maceration, as having a short fibre, at a reach of two and a half inches, or about those limits. But before that time Horace Hall had taken out a patent for the application of moisture in spinning flax, to separate the fibres, and reduce the length of the staple; and the machines manufactured according to that patent were constructed with the reach of $4\frac{3}{4}$ inches.

Question.

The question for the opinion of the court was—whether the plaintiff's patent was valid in point of law.

The case was argued in the last Hilary Term.

Sir F. Pollock, for the plaintiff.—The finding of the jury establishes, that, before the granting of the plaintiff's patent, it was not known that flax could be spun by means of maceration at a reach of two inches and a half, and that the discovery was useful as well as new. The specification points to an invention of new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances. Two objections only can possibly be presented to the attention of the court—the one that the plaintiff's patent is void, because the specification is void upon the face of it—the other, that, after the patent granted to Horace Hall, the plaintiff cannot have a patent for his

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discovery, although new and useful, as the jury have found. No objection can be urged to the specification but what appears on the face of the instrument itself. How can it be matter of legal judgment, that, although the plaintiff's invention is new and useful, it cannot be the subject of a patent, because Horace Hall attained a similar result by a somewhat similar, though more circuitous process? The plaintiff, by a process that is new for the purpose, macerates the flax (which the jury find never was done before) and at once, by one operation, spins the flax so macerated into a fine thread by a new adaptation of machinery. Undoubtedly, the fundamental principle of all spinning, is, to adapt the reach to the length of the staple. The plaintiff's invention consists in the maceration and spinning by one process.

Sir W. Follett (*Wilde*, Serjeant, was with him), for the defendant.—The patent is clearly invalid. It is taken out for "*new machinery for macerating flax* and other similar fibrous substances previous to drawing and spinning it;" and for "*improved machinery for spinning the same* after having been so prepared." In order to sustain the patent, the patentee must shew an invention of new and improved machinery for both these purposes. Now, the specification discloses no novelty or improvement in any part of the machinery; but merely (the common spinning machine being used) a closer approximation of the rollers by means of slides—slides having been in use before, but not so constructed as to admit of the rollers being placed within so short a distance of each other as two inches and a half. The complaint here is, not that the defendants have adopted the supposed improvement of macerating the flax, but that they, having discovered another method of reducing the fibre, have availed themselves of their discovery by using a machine with slides so constructed as to admit of the rollers being approximated within the space of two inches and a half.

It is perfectly clear, that, if a man takes out a patent for a twofold invention, the patent, if void as to one, is void altogether—*Hill* v. *Thompson*, 2 Moore, 424, 8 Taunt. 375, Holt, 636, 3 Mer. 629; *Brunton* v. *Hawkes*, 4 B. & A. 541; to obviate this inconvenience it was that the provision for a disclaimer as to part was introduced into the late statute (124). This patent does not purport to be taken out

(124) 5 & 6 Will. 4, c. 83, s 1, which enacts "that any person who, as grantee, assignee, or otherwise, hath obtained, or who shall hereafter obtain letters patent for the sole making, exercising, vending, or using of any invention, may, if he think fit, enter with the clerk of the patents of England, Scotland, or Ireland respectively, as the case may be, having first obtained the leave of his majesty's Attorney-General or Solicitor-General in case of an English patent, of the Lord Advocate or Solicitor-General of Scotland in the case of a Scotch patent, or of his majesty's Attorney-General or Solicitor-General for Ireland in the case of an Irish patent, certified by his fiat and signature, a disclaimer of any part of either the title of the invention or of the specification, stating the reason for such disclaimer, or may, with such leave as aforesaid, enter a memorandum of any alteration in the said title or specification, not being such disclaimer or such alteration as shall extend the exclusive right granted by the said letters patent; and such disclaimer or memorandum of alteration, being filed by the said clerk of the patents, and inrolled with the specification, shall be deemed and taken to be part of such letters patent or such specification in all courts whatever: Provided always that any person may enter a caveat, in like manner as caveats are now used to be entered, against such disclaimer or alteration; which caveat being so entered shall give the party entering the same a right to have notice of the application being heard by the Attorney-General, or Solicitor-General, or Lord Advocate respectively: Provided also that no such disclaimer or alteration shall be receivable in evidence in any action or suit (save and except in any proceeding by scire facias) pending at the time when such disclaimer or alteration was inrolled, but in every such action or suit the original title and specification alone shall be given in evidence, and be deemed and taken to be the title and specification of the invention for which the letters patent have been or shall have been granted: Provided also that it shall be lawful for the Attorney-General or Solicitor-General or Lord Advocate, before granting such fiat, to require the party applying for the same to advertize his disclaimer or alteration in such manner as to such Attorney-General or Solicitor-General or Lord Advocate, shall seem right, and shall, if he so require such advertisement, certify in his fiat that the same has been duly made."

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for an improved method of spinning flax; but for *new machinery* for preparing, that is, wetting it, and for *improved machinery* for spinning it after it has been wetted: the specification first describes the new machinery for macerating, and then the improved machinery for spinning—the former consisting of certain tin cans, and the latter "the placing the drawing rollers only two and a half inches from the retaining rollers," which the plaintiff says, "constitutes the principal improvement in the said spinning machinery." The patentee does not profess to alter the machinery so as to allow the rollers to be placed within the two and a half inches: the common spinning machine with slides is used; and in spinning cotton, as appears by the indorsement on the postea—the object of which was, that the finding of the jury should not be limited to the words of the issue—the reach had always varied from seven eighths of an inch to an inch and a quarter. The specification points out no new mode of placing the rollers at the distance of two and a half inches: no person acquainted with spinning would from reading the specification discover any improvement in the art. In *The King* v. *Wheeler*, 2 B. & A. 345, a patent was taken out for, "a new or improved method of drying and preparing malt." In the specification, it was stated that the invention consisted in exposing malt previously made to a very high degree of heat; but it did not describe any new machine invented for that purpose; nor the state, whether moist or dry, in which the malt was originally to be taken for the purpose of being subjected to the process; nor the utmost degree of heat which might be safely used; nor the length of time to be employed; nor the exact criterion by which it might be known when the process was accomplished: and it was held that the patent was void, first, because the specification was not sufficiently precise, secondly, because the patent appeared to be for a different thing from that mentioned in the specification. Abbott, C. J., in delivering

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the judgment of the court, there says: "The language in which the supposed invention is described in a patent of this nature is the language of the patentee himself. He represents to the crown that he has invented this or that thing, and that he is the first and sole inventor thereof, &c.; and the crown, yielding to this representation, and willing to give encouragement to all arts and inventions that may be for the public good, grants to the patentee the sole liberty and privilege of using his said invention for a certain term, under the conditions before noticed [one of which is, that, if the patentee shall not particularly describe the nature of his invention, and in what manner the same is to be performed, by an instrument in writing under his hand and seal, to be inrolled in the High Court of Chancery within six calendar months, then the patent shall be void]. It is obvious, therefore, that, if the patentee has not invented the matter or thing of which he represents himself to be the inventor, the consideration of the Royal grant fails, and the grant consequently becomes void. And this will not be the less true, if it should happen that the patentee has invented some other matter or thing, of which, upon a due representation thereof, he might have been entitled to a grant of the exclusive use. It is well known that the granting of monopolies was restrained by the statute 21 Jac. 1, c. 3, to the sole working or making of any manner of new manufactures, and to the true and first inventor of such manufactures. Now, the word 'manufactures' has been generally understood to denote either a thing made, which is useful for its own sake, and vendible as such, as, a medicine, a stove, a telescope, and many others, or to mean an engine or instrument, or some part of an engine or instrument, to be employed, either in the making of some previously known article, or in some other useful purpose, as, a stocking-frame, or a steam-engine for raising water from mines. Or it may perhaps extend also to a new process to be carried on by

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known implements or elements acting upon known substances, and ultimately producing some other known substance, but producing it in a cheaper or more expeditious manner, or of a better and more useful kind. But no merely philosophical or abstract principle can answer to the word manufactures. Something of a corporeal and substantial nature, something that can be made by man from the matters subjected to his art and skill, or at the least some new mode of employing practically his art and skill, is requisite to satisfy this word. Or, supposing a new process to be the lawful subject of a patent, he may represent himself to be the inventor of a new process; in which case it should seem that the word 'method' may be properly used as synonymous with process." The real subject of the patent in this case is nothing more than using the old machine with the old substance newly prepared. Are the defendants guilty of an infringement of the plaintiff's patent, if they spin *dry* flax with a reach of two inches and a half? The application of moisture in the spinning of flax was long known. In *Rex* v. *Else*, 11 East, 109, n., where a patent was granted for a new invented lace called French or ground lace, and the specification went generally to the mixing silk and cotton thread upon the same frame; proof that silk and cotton thread had before been mixed upon the same frame for lace, though not the particular mode practised by the patentee, was held to avoid the patent. In *Boulton & Watt* v. *Bull*, 2 H. Blac. 463, a patent was granted to Mr. Watt for a new invented method of using an old engine in a more beneficial manner than was before known: the specification stated that the method consisted of certain *principles*, and described the mode of applying those principles to the purposes of the invention: and Buller, J., said (p. 485-6): "There is one short observation arising on this part of the case which seems to me to be unanswerable, and that is, that, if the principle alone be the foundation of the patent,

it cannot possibly stand, with that knowledge and discovery which the world were in possession of before. The effect, the power, and the operation of steam were known long before the date of this patent; all machines which are worked by steam are worked on the same principle. The principle was known before, and therefore if the principle alone be the foundation of the patent, though the addition may be a great improvement (as it certainly is), yet the patent must be void ab initio."

Sir F. Pollock, in reply.—The question at issue in this cause arose before Mr. Baron Parke in the year 1831, in a case of *Kay* v. *Renshaw*, where Horace Hall's patent was attempted to be set up as an answer to the action: the jury (a Lancashire special jury, and therefore peculiarly conversant with the subject), having all the plans before them, after a full and patient consideration of the case, arrived at the conclusion that the plaintiff's patent was not affected by Mr. Hall's: a rule was obtained to set aside the verdict for the plaintiff (in the court of Exchequer), but was afterwards discharged. The question for the consideration of the court now is, not what are the plaintiff's rights as against the present defendants, but whether or not, with the light afforded by the finding of the jury and the special indorsement on the postea, the court can see that this patent is void. It is not, as seems to be assumed on the other side, a patent taken out for two distinct processes: the whole consists of but one invention—the maceration of flax and the spinning it at a reach of two and a half inches. It appears by the finding of the jury that there was no machine in existence by which this could be done. [*Vaughan*, J.—The patentee in effect says—macerate your flax, and, when it is macerated, take my improved machine, and spin it.] The improved machine, is, the old one altered so as to reduce the reach to two inches and a half. The plaintiff claims no

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exclusive right to the use of a machine with a reach of two and a half inches: the whole combined process is that of which he claims to be the inventor.

Cur. adv. vult.

TINDAL, C. J., now stated the opinion of the court:—

In this case, which has been sent to this court by his Honor the Master of the Rolls, the question as to the validity of the patent has been argued before us upon various grounds of objection; and, consequently, a certificate in the general terms of the question, that the patent does not appear to us to be valid in point of law, could not give satisfaction to the court from which the question was sent. We therefore proceed shortly to state the ground upon which our opinion is formed, that the patent in question is not valid in point of law.

The patent is taken out for "a new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances, by power;" and the invention is declared, in the specification, to consist of "new machinery for macerating flax and other similar fibrous substances, previous to drawing and spinning it; and also of improved machinery for spinning the same, after having been so prepared."

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and a half inches from the retaining rollers, and that this constitutes the principal improvement in the said spinning machinery." And he then proceeds to assign the reason and principle upon which the alleged improvement rests. And in a later part of the specification (when stating the extent of what he claims as his own invention in respect of improved machinery for spinning flax), he describes it to be, the wooden or other trough for holding the rovings when taken from the macerating vessels, "and the placing of the retaining rollers and the drawing rollers nearer to each other than they have ever before been placed, say, within two and a half inches of each other; for the purpose aforesaid." So that, looking at the whole of the specification, it is not the use of the wooden or other trough as used by him upon which he relies, as indeed it obviously could not be, as an important invention, nor as the proper subject of a patent; but it is "the placing and retaining of the respective rollers within two and a half inches from each other," that forms the real subject-matter of the patent for the improved machinery.

Now, whether a patent can by law be taken out for placing the retaining rollers and the drawing rollers of a spinning machine (which machine itself was known and in use before) within two inches and a half of each other, under the circumstances stated in the case, is the real question between the parties: and we think it cannot; for, it appears from the indorsement upon the postea, that, before the granting of this patent, flax and other fibrous substances were spun with machines by which the reach was varied according to the staple or fibre of the article to be spun, and that that had been a fundamental principle of *dry* spinning known and used before the granting of this patent: and, further, that the reach used in cotton spinning had been less than two inches and a half. The application, therefore, of a reach of two inches and a half to the spinning of flax, when in a state of maceration, by

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which the fibre of flax will not hold together beyond two inches and a half, does not appear to us to be any new invention or discovery, but is merely the application of a piece of machinery already known and in use, to the new macerated state of the flax. The fundamental principle of dry spinning was, that the reach varied according to the length of the staple or fibre of the article to be spun; and spinning machines were in use either with the reaches fixed, or connected with slides, so that their distance might be varied according to the length of the fibre of the article intended to be spun; and, consequently, there is nothing new in applying the use of a spinning machine with a reach of such a degree of shortness as would suit the continuity of the roving of the flax after it is macerated.

It is to be remarked that the application of moisture in spinning flax, for the purpose of separating the fibres and reducing the length of the staple, was not new in practice, and had been resorted to under Horace Hall's patent, though in a different manner from that employed upon this occasion. Now, suppose a patent to have been first obtained for some entirely new method, either chemical or mechanical, of reducing the fibre of flax to a short staple, we think that a second patent could not be taken out for an improved mode of machinery in spinning flax, which

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ject of macerating and spinning that macerated flax on a machine where the rollers are retained at the prescribed distance from each other. But this appears to be at variance with the specification itself, which divides the invention and the subject-matter of the patent into two distinct parts; and even if it is to be considered as one entire invention, if part of what is claimed is not properly the subject of a patent, or not new, the whole must be void.

We shall therefore certify to his Honor, that, in our judgment, the patent in question is not valid in law.

Certificate accordingly (125).

(125) See Kay v. Marshall, before the Lord Chancellor, 1 Mylne & Craig, 373.

WILMSHURST and Another *v.* BOWKER and Another.

Wednesday, May 8th.

THIS was an action of trover for six hundred quarters of wheat.

The plaintiffs purchased of the defendants 600 quarters of wheat at a certain price, payment to be made by a bankers' draft on London at two months, to be remitted by the plaintiffs to the defendants on receipt by the former of the invoice and bill of lading. The wheat was shipped for the account and risk of the plaintiffs, and the invoice and bill of lading sent to and received by the plaintiffs. The plaintiffs not remitting the draft pursuant to the terms of the contract, the defendants stopped the wheat in transitu, and immediately re-sold it:—Held, that the plaintiffs had not such a right of possession as to entitle them to maintain trover.

Quære, whether a vendor of goods has a right to stop them in transitu, where the vendees are neither bankrupt nor insolvent.

The defendants pleaded—to the second count of the declaration—That the wheat in that count mentioned was wheat which, before the time of the supposed grievances in that count mentioned, to wit, on the 25th October, 1836, the plaintiffs had bargained to buy, and the defendants had bargained to sell to the plaintiffs, at and for a certain price in that behalf agreed, to wit, for the price of 51*s.* per quarter, on board, upon certain terms and conditions for the payment thereof, that is to say, that the payment thereof should be made by bankers' draft on London, at two months' date, to be remitted by the plaintiffs to the defendants upon receipt by the plaintiffs of the invoice and bill of lading; that, afterwards, and before the time of the sup-

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posed grievances in the second count mentioned, to wit, on the 27th October, in the year aforesaid, the defendants, in pursuance of the said bargain, shipped the said wheat in and on board of a certain ship or vessel called the Ramsgate, of which one William Lightowler was the master and commander, to be conveyed to a certain place, to wit, to Maidstone, in the county of Kent, to be there delivered to the plaintiffs according to and subject to the terms and conditions of the said bargain for the sale of the said wheat, and for the payment of the price thereof as aforesaid; that the said William Lightowler then made a certain bill of lading of the said wheat, and thereby acknowledged the shipping and delivery to him of the wheat on board the said ship or vessel, and undertook, on the arrival of the said ship or vessel at Maidstone, to deliver the wheat to the order of the defendants; that the defendants then also made an invoice of the wheat, and sent and dispatched the said invoice and bill of lading to the plaintiffs, and the plaintiffs afterwards, to wit, on &c., received the invoice and bill of lading; that the plaintiffs did not nor would, upon receipt of the invoice and bill of lading, remit or offer or tender to remit to the defendants any bankers' draft on London, but, on receipt of the invoice and bill of lading, wholly failed and neglected so to do, contrary to their agreement in that behalf: whereupon the defendants caused and procured the said wheat to be detained on board the said ship or vessel, and hindered and prevented the wheat from being delivered to the plaintiffs, as the defendants lawfully might for the cause aforesaid: which were the said supposed grievances and conversion in the said second count mentioned—verification.

New assignment.

The plaintiffs new assigned—that, in the said second count, they the plaintiffs declared against the defendants, not for the grievances in the last plea mentioned and therein attempted to be justified, but for this, that, although, after the making of the said bill of lading in the

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last plea mentioned, by William Lightowler, for the delivery of the wheat to the order of the defendants, as in that plea mentioned, the defendants indorsed the said bill of lading to the plaintiffs, and sent the same so indorsed to the plaintiffs; and, although in the invoice so made by the defendants and by them sent and dispatched to the plaintiffs as in that plea also mentioned, the wheat was stated and expressed by the defendants to be shipped for the account and risk of the plaintiffs; and although, on the occasion of the shipping of the wheat to be conveyed by the plaintiffs as in that plea also mentioned, to wit, on &c., the defendants also caused the said wheat to be insured for and on account and at the proper costs and charges of the plaintiffs, and then sent the policy of insurance whereby the said wheat was so insured, together with the said invoice and the bill of lading so indorsed as aforesaid, to the plaintiffs, who then received the policy and the invoice and bill of lading so indorsed to them, and from the time of the receipt of the same hitherto had been and still were the holders thereof respectively; and although the plaintiffs, at the time of the stoppage of the wheat in the plea mentioned, were not, nor had they at any time since been, bankrupt or insolvent, or unable to pay for the said wheat; of all which the defendants then and always afterwards had notice: yet the defendants, well knowing all and singular the premises, forthwith upon the stoppage of the wheat, and before the lapse and expiration of a reasonable time for the plaintiffs to remit to the defendants a bankers' draft on London, according to their contract in that behalf, as in the said plea mentioned, to wit, on &c., wrongfully and injuriously, without the consent and against the will of the plaintiffs, did wholly revoke and rescind the sale of the wheat to the plaintiffs; and then immediately thereupon, without further notice to the plaintiffs, and without suffering or permitting the plaintiffs to pay them for the said wheat in manner aforesaid, or otherwise, and thereby to

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posed grievances in the second count mentioned, to wit, on the 27th October, in the year aforesaid, the defendants, in pursuance of the said bargain, shipped the said wheat in and on board of a certain ship or vessel called the Ramsgate, of which one William Lightowler was the master and commander, to be conveyed to a certain place, to wit, to Maidstone, in the county of Kent, to be there delivered to the plaintiffs according to and subject to the terms and conditions of the said bargain for the sale of the said wheat, and for the payment of the price thereof as aforesaid; that the said William Lightowler then made a certain bill of lading of the said wheat, and thereby acknowledged the shipping and delivery to him of the wheat on board the said ship or vessel, and undertook, on the arrival of the said ship or vessel at Maidstone, to deliver the wheat to the order of the defendants; that the defendants then also made an invoice of the wheat, and sent and dispatched the said invoice and bill of lading to the plaintiffs, and the plaintiffs afterwards, to wit, on &c., received the invoice and bill of lading; that the plaintiffs did not nor would, upon receipt of the invoice and bill of lading, remit or offer or tender to remit to the defendants any bankers' draft on London, but, on receipt of the invoice and bill of lading, wholly failed and neglected so to do, contrary to their agreement in that behalf: whereupon the defendants caused and procured the said wheat to be detained on board the said ship or vessel, and hindered and prevented the wheat from being delivered to the plaintiffs, as the defendants lawfully might for the cause aforesaid: which were the said supposed grievances and conversion in the said second count mentioned—verification.

New assignment.

The plaintiffs new assigned—that, in the said second count, they the plaintiffs declared against the defendants, not for the grievances in the last plea mentioned and therein attempted to be justified, but for this, that, although, after the making of the said bill of lading in the

last plea mentioned, by William Lightowler, for the delivery of the wheat to the order of the defendants, as in that plea mentioned, the defendants indorsed the said bill of lading to the plaintiffs, and sent the same so indorsed to the plaintiffs; and, although in the invoice so made by the defendants and by them sent and dispatched to the plaintiffs as in that plea also mentioned, the wheat was stated and expressed by the defendants to be shipped for the account and risk of the plaintiffs; and although, on the occasion of the shipping of the wheat to be conveyed by the plaintiffs as in that plea also mentioned, to wit, on &c., the defendants also caused the said wheat to be insured for and on account and at the proper costs and charges of the plaintiffs, and then sent the policy of insurance whereby the said wheat was so insured, together with the said invoice and the bill of lading so indorsed as aforesaid, to the plaintiffs, who then received the policy and the invoice and bill of lading so indorsed to them, and from the time of the receipt of the same hitherto had been and still were the holders thereof respectively; and although the plaintiffs, at the time of the stoppage of the wheat in the plea mentioned, were not, nor had they at any time since been, bankrupt or insolvent, or unable to pay for the said wheat; of all which the defendants then and always afterwards had notice: yet the defendants, well knowing all and singular the premises, forthwith upon the stoppage of the wheat, and before the lapse and expiration of a reasonable time for the plaintiffs to remit to the defendants a bankers' draft on London, according to their contract in that behalf, as in the said plea mentioned, to wit, on &c., wrongfully and injuriously, without the consent and against the will of the plaintiffs, did wholly revoke and rescind the sale of the wheat to the plaintiffs; and then immediately thereupon, without further notice to the plaintiffs, and without suffering or permitting the plaintiffs to pay them for the said wheat in manner aforesaid, or otherwise, and thereby to

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redeem the said wheat, and release and discharge the same from the supposed lien of the defendants thereon (as the plaintiffs were then and at all times afterwards ready and willing to do, and would otherwise have done, whereof the defendants then and at all times afterwards had notice), and without giving or allowing to the plaintiffs a reasonable time or opportunity so to do, wrongfully and injuriously did then resume as their own the absolute property and dominion in and over the said wheat; and then, without the license or consent and against the will of the plaintiffs, unlawfully did dispose of the said wheat and every part thereof otherwise and to other persons than the plaintiffs, and to and for their own proper advantage and benefit as their own absolute property, freed and discharged from all right, title, or interest of the plaintiffs to or in the same or any part thereof, and thereby then converted and disposed of the said wheat to their own use, in manner and form as in the second count of the declaration alleged: which grievances above newly assigned were other than and different from the grievances in the plea mentioned, and therein attempted to be justified.

First plea to the new assignment.

The defendants pleaded to the new-assignment—First, that the wheat in regard to which the plaintiffs had above newly assigned the said several supposed grievances, was wheat which, as in the defendant's former plea mentioned, to wit, upon the 25th October, 1836, and before the time of the several supposed grievances newly assigned, the plaintiffs had bargained to buy, and the defendants had bargained to sell to the plaintiffs, at and for a certain price in that behalf agreed, to wit, for the price of 51*s.* per quarter, on board, upon certain terms and conditions for the payment thereof, to wit, that payment should be made by bankers' draft on London at two months' date, to be remitted by the plaintiffs to the defendants upon receipt by the plaintiffs of the invoice and bill of lading; that afterwards, and before the time of the said supposed grievances newly assigned, to wit,

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on the 27th October, in the year aforesaid, the defendants, in pursuance of the said bargain, shipped the said wheat in and on board of a certain ship or vessel called the Ramsgate, of which one William Lightowler was the master and commander, to be conveyed to a certain place, to wit, Maidstone, in the county of Kent, to be there delivered to the plaintiffs according to and subject to the terms and conditions of the said bargain for the sale of the said wheat, and for the payment of the price thereof as aforesaid; that the said William Lightowler then made a certain bill of lading of the said wheat, and thereby acknowledged the shipping and delivery to him of the said wheat on board of the said ship or vessel, and undertook, on the arrival of the said ship or vessel at Maidstone, to deliver the wheat to the order of the defendants; that the defendants then also made an invoice of the said wheat, and sent and dispatched the said invoice and bill of lading to the plaintiffs; and the plaintiffs afterwards, to wit, on &c., received the invoice and bill of lading: yet that the plaintiffs did not nor would upon receipt of the said invoice and bill of lading, remit, or offer or tender to remit to the plaintiffs any bankers' draft on London; but, on receipt of the said invoice and bill of lading, wholly failed and neglected so to do, contrary to their agreement in that behalf: whereupon the defendants, upon their stoppage of the said wheat, did revoke and rescind the sale of the said wheat to the plaintiffs, and resumed as their own the property and dominion in and over the said wheat, and did dispose of the same to and for their own proper advantage and benefit, as they lawfully might for the cause aforesaid—verification.

Second plea to the new assignment.

Secondly, that the said wheat mentioned by the plaintiffs in newly assigning the said supposed grievances, to wit, on &c., was bargained to be sold to the plaintiffs for the price and on the terms and conditions for the payment thereof in the plea to the second count mentioned, and was shipped on board the vessel as in that plea mentioned, to

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wit, on &c.; that, although the bill of lading and invoice were sent to the plaintiffs and received by them, to wit, on &c., yet the plaintiffs, upon the receipt thereof, to wit, on &c., remitted to the defendants, instead of a bankers' draft on London, a certain acceptance of the plaintiffs for a certain sum of money, to wit, the amount of the price of the wheat, such acceptance not being a bankers' draft on London, and such acceptance being so remitted and sent by the plaintiffs to the defendants as and for payment of the price of the said wheat, without the plaintiffs then promising or giving notice, or in any way intimating to the defendants, that they would or were about to remit to the defendants any bankers' draft on London for payment of the price of the said wheat, and without asking for any further time for that purpose: whereupon and upon receipt of the said acceptance of the plaintiffs, the defendants forthwith returned to the plaintiffs their said acceptance, and stopped the said wheat; and forthwith upon their stoppage of the said wheat did revoke and rescind the sale of the said wheat, and resume as their own the property and dominion in and over the said wheat, and did dispose of the same to and for their own advantage and benefit, as they lawfully might for the cause aforesaid—verification.

Demurrer.

Demurrer, and joinder.

The case was argued at the sittings in banc after last Hilary Term.

Property in the goods vested in the vendee.

Butt, in support of the demurrer.—The pleas afford no answer to the declaration and new assignment. The lien of an unpaid vendor upon the goods sold continues so long only as they remain in his possession: it is gone the moment they are shipped to the order of the vendee. The delivery to the carrier so far vests the property in the vendee as to entitle the vendor to maintain an action for the price —*Alexander* v. *Gardner*, 1 Scott, 630, 1 New Cases, 671; *Dutton* v. *Solomonson*, 3 B. & P. 582. In this latter case,

Lord Alvanley said: "When this point was first mentioned, I was surprised, for it appeared to me to be a proposition as well settled as any in the law, that, if a tradesman order goods to be sent by a carrier, though he does not name any particular carrier, the moment the goods are delivered to the carrier, it operates as a delivery to the purchaser: the whole property immediately vests in him; he alone can bring an action for any injury done to the goods; and, if any accident happen to the goods, it is at his risk. The only exception to the purchaser's right over the goods, is, that the vendor, *in the case of the former becoming insolvent*, may stop them in transitû." So, in *Walley* v. *Montgomery*, 3 East, 585, where the consignor of goods abroad advised the consignee by letter that he had chartered a certain ship on his account, and inclosed him an *invoice* of the goods laden on board, which were therein expressed to be *for account and risk* of the consignee, and also a bill of lading in the usual form, expressing the delivery to be made to order, &c., *he paying freight for the said goods according to charterparty;* and the letter of advice also informed the consignee that the consignor had drawn bills on him at three months for the value of the cargo: it was held that the invoice and bill of lading sent to the consignee, and the delivery of the goods to the captain, vested the property in the consignee, subject only to be divested by the consignor's right to stop the goods in transitû in case of the insolvency of the latter; and, the consignor's agent having obtained possession of the cargo under another bill of lading, and having refused to deliver it up unless the consignee would make immediate payment, which he declined doing, but offered his acceptances at three months in the manner before stipulated—it was held that the consignee might maintain trover against such agent without having tendered payment of the freight either to him or the captain, the defendant having possessed himself of the goods wrongfully. That is precisely

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this case. Lord Ellenborough there says: "I think the *invoice* vested the property in the plaintiff; for, if there had been a loss at sea, the loss must have been borne by him. Then, if the property were vested in him, subject only to a defeasance if he did not perform the conditions required of him, I think the plaintiff would be entitled to recover." And Grose, J., said: "In order to sustain the action, the plaintiff must prove the property in himself, and a conversion by the defendant. The property of the goods was once in Schumann & Co.: but by the bill of lading and invoice sent to the plaintiff, and the delivery to the captain, the property passed from them to the plaintiff to every purpose except as to the right of stopping the goods in transitû to the vendee. The right to stop in transitû was originally a mere equitable right; but, for the convenience of trade, the courts of law have converted it into a legal remedy. No such right, however, existed in this case, it not appearing that the vendees were insolvent. It was not a condition precedent to the delivery of the wheat, that the plaintiffs should remit a bankers' draft; that was a mere collateral agreement, for the non-performance of which the defendants might have brought a cross action. Even if the defendants had a right to rescind the contract on the plaintiffs' failure to remit the bankers' draft, such right could, at all events, only arise on the lapse of a reasonable time for the performance of the condition on the breach of which the right depends; which the new assignment negatives. Then, assuming the defendants to have had an equitable lien, that clearly did not authorize the re-sale of the wheat.

Effect of the new assignment.

Greenwood, contrà.—The plaintiffs are precluded by the new-assignment from raising the question as to the right of stoppage in transitû. In *Cheasley* v. *Barnes*, 10 East, 80, the court said "that the object of a new assignment was, to give the go-by to all that the defendant had pleaded, by

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saying that the trespass stated and justified by the defendant was not that which the plaintiff had complained of in his declaration, but some other which is stated." And see 1 Wms. Saund. 299, n. (6), and the judgment of Patteson, J., in *Bone* v. *Dawe*, 3 Ad. & E. 719. In *Norman* v. *Wescombe*, 2 M. & Welsby, 349, Lord Abinger says: "A new assignment does not amount to an admission of the facts alleged in the plea, but is merely an assertion that the plaintiff will not investigate the subject-matter set forth in the plea. In point of fact it is not an admission, but merely amounts to saying—'I do not choose, and never intended, to go for that trespass which you have attempted to justify.' Suppose a plaintiff declares, embracing several matters in his declaration, to one of which the defendant pleads a justification, which the plaintiff cannot deny; and he agrees to have it struck out of his declaration, and obtains an order for that purpose, and goes to trial on the other matters—that matter would be taken from the consideration of the judge and jury, and would not be evidence in support of the other issues. Here, the pleadings previous to the new assignment are to be taken as if they were in point of fact struck out; and the defendant has no right to make use of them on the trial of the other issues." All inquiry therfore as to the right of stoppage in transitû is abandoned.

Right of stoppage in transitus a strict legal right.

By the sale of the goods, the property in them is vested, not absolutely, but conditionally only in the vendees, subject to a defeasance on their failure to pay for them according to the terms of the contract: and by the stoppage the vendors did not acquire a mere right of lien, but a property. The right to stop goods in transitu is not an equitable, but a strict legal right—a right which may be exercised by an unpaid vendor in all cases, whether the non-payment arises by reason of the inability or the unwillingness of the vendee to pay for the goods. In *Clay* v. *Harrison*, 5 M. & R. 17, 10 B. & C. 99, it was expressly deter-

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mined, that, after a stoppage in transitu, the vendee ceases to have an insurable interest in goods. It may be that the contract is left open for a reasonable time. Buller, J., in *Ellis* v. *Hunt*, 3 T. R. 469, says: "It is clear that bankruptcy itself does not put an end to the contract; and, if not, the right of the vendor to seize goods in transitu is founded only on equitable principles. It is a right with which he is indulged on principles of justice, originally established in courts of equity, and since adopted in courts of law." *Lickbarrow* v. *Mason*, 2 T. R. 65, 1 H. Blac. 357, 2 H. Bl. 211, 6 East, 20, n., 5 T. R. 367, 683, is an authority to shew, that, where the consignee of goods becomes insolvent, the consignor's right to stop them in transitu is a legal right. In *Snee* v. *Prescot*, 2 Atk. 245, Lord Hardwicke says: "I admit the case mentioned by the plaintiffs counsel, of inland dealers in England, that, if goods are delivered to a carrier or hoyman to be delivered to A., and the goods are lost by the carrier or hoyman, the *consignee* can only bring the action, which shews the property to be in him, and it is the same where goods are delivered to a master of a vessel. But, suppose such goods are actually delivered to a carrier, to be delivered to A., and while the carrier is upon the road, and before actual delivery to A. by the carrier, the consignor hears A., his consignee, is likely to become a bankrupt, or is actually one, and countermands the delivery, and gets them back into his own possession again, I am of opinion that no action of trover would lie for the assignees of A., because the goods, while they were in transitu, might be so countermanded." His lordship there lays it down as a question of law. Lord Loughborough, in delivering his opinion in *Lickbarrow* v. *Mason*, in the Exchequer Chamber, says, 1 H. Blac. 363— "I state it to be a clear proposition that the vendor of goods not paid for, may retain the possession against the vendee, not by aid of any equity, but on grounds of law." So, in the case of the *Assignees of Burghall* v. *Howard*, cited

by Lord Loughborough, 1 H. Blac. 365, n., Lord Mansfield considered the right of the consignor to stop the goods in transitu as a legal right, not depending upon principles of equity only, but on the laws of property. *Wiseman* v. *Vandeputt*, 2 Vern. 203, is an authority to the same effect: there the right of stoppage is not put as a right to be exercised only in case of bankruptcy or insolvency, but on non-payment. In *Oppenheim* v. *Russell* 3 B. & P. 42, the right to stop goods in transitu was expressly declared by Lord Alvanley and the rest of the court, to be a common law right. "It has been determined," says his lordship, "that the moment goods are delivered by A. to a common carrier, to be by him forwarded to B., the property vests in B., and, if they are lost, he, and not the consignor, is the person to bring an action for that loss. This it was contended decides the present point. But we must recollect, that, though the property is in the consignee, still it is liable to be divested by the consignor under certain circumstances, and when the right of resumption is exercised by the consignor, the property is revested in him. Though the consignee is the person who must sustain any loss happening to the goods, and therefore the carrier is principally his agent, still he is so far the agent of the consignor that the law has said the consignor has a right to take the goods out of the hands of the carrier at any time before delivery to the consignee." [*Tindal*, C. J.—It cannot be doubted that the right to stop goods in transitu is a legal right. But the question is, whether the right exists in the absence of bankruptcy or insolvency of the consignee: if it were so, we could hardly be in any doubt about it. *Bosanquet*, J.—It would be extremely inconvenient if this were allowed; a merchant often makes contracts on the faith of expected consignments (126).] In

(126) A re-sale of goods by a vendee, and payment to him, does not destroy the vendor's right of stoppage in transitu. Craven v. Ryder, 6 Taunt. 433, 2 Marsh. 127.

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Owenson v. *Morse*, 7 T. R. 64, where A. agreed to buy some articles of plate of B., who was to get A.'s arms engraved on them and to pay for the engraving; it was held that a delivery to the engraver for that purpose was not a delivery to A. so as to defeat B.'s right of stopping the goods in transitu, the price of the goods not being paid by A. (127). In *Stokes* v. *La Riviere*, cited by Lawrence, J., in *Bohtlingk* v. *Inglis*, 3 East, 397, Lord Mansfield said: "No point is more clear than that, if goods are sold, and the price not paid, the seller may stop them in transitu, I mean in every sort of passage to the hands of the buyers." In *Dixon* v. *Yates*, 5 B. & Ad. 313, 2 N. & M. 177, Littledale, J., says: "There are two great principles of law which must decide the present case; the one is, that so long as goods sold and unpaid for remain in the immediate possession of the vendor, he may refuse to deliver them: and, if they remain in the possession of the agent, i. e. a warehouseman or carrier, he may stop them. The other is, that a second vendee of a chattel cannot stand in a better situation than his vendor." If by the stoppage the *property* was restored to the vendors, and the contract rescinded, then clearly trover cannot be maintained against them for it (128).

Trover not maintainable.

If even the stoppage only enured to give the defend-

(127) There the goods were paid for in notes of a bank that had failed the same day. And Lord Kenyon treated it as an exercise of ingenuity (in other words, a fraud,) on the part of the plaintiff, the purchaser.

(128) In Hodgson v. Loy, 7 T. R. 440, Lord Kenyon said "that the right of the vendor to stop goods in transitu in case of the insolvency of the vendor, was a kind of equitable lien adopted by the law for the purposes of substantial justice, and that it did not proceed, as the plaintiff's counsel supposed, on the ground of rescinding the contract." And in Ellis v. Hunt, 3 T. R. 467, Lord Kenyon says: "The doctrine of stopping goods in transitu is bottomed on the case of Snee v. Prescott, where Lord Hardwicke established a very wise rule, that the vendor might resume the possession of goods consigned to the vendee, before delivery, in case of the *bankruptcy* of the vendee: on this all the other cases are founded."

ants a lien—a proprietary lien—on the goods, still the action is misconceived. In *Hunter* v. *Beal*, cited 2 T. R. 75, Lord Mansfield held, that, as between the vendor and vendee, the property is not altered till the delivery of the goods. In *Litt* v. *Cowley*, 7 Taunt. 169, it was held that a consignor might maintain trover against the assignees of the consignee, to whom the goods had been, by a mistake of the carrier, delivered after a stoppage in transitu. In *Dixon* v. *Yates*, 5 B. & Ad. 343, Parke, B., says: "The rule is clear, that a second vendee, who neglects to take either actual or constructive possession, is in the same situation as the first vendee, under whom he claims. He gets the title *defeasible on non-payment of the price* by the first vendee." *Walley* v. *Montgomery*, 3 East, 585, and *Coxe* v. *Harden*, 4 East, 211, are strong authorities to the same effect. A conditional delivery does not vest the property—2 B. & A. 329, n. In the present case, when the wheat was put on board the Ramsgate on the special terms of the contract, the property in it vested defeasibly in the consignees; but was divested on their failure to perform the condition upon which their right to it depended. And, under these circumstances, they clearly had neither the right of possession nor the right of property, both of which are essential to enable a party to maintain trover. In *Bloxham* v. *Saunders*, 7 D. & R. 396, 4 B. & C. 941, it was expressly decided that the purchaser of goods cannot maintain trover for them without paying the price; for, though he acquires the right of property by the purchase, he can only acquire the right of possession by the payment: and, in order to maintain trover, he must have both the right of property and the right of possession.

Butt, in reply.—None of the cases cited establish the proposition for which the defendants contend, viz. that goods may be stopped in transitu, in the absence of bankruptcy or insolvency, on mere non-payment of the price.

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Such a doctrine was never before attempted to be set up: and it would be manifestly unjust; for, it would apply as well where 1*l.* out of 1000*l.* remained unpaid, as if default were made as to the entire sum. In *Owenson* v. *Morse*, *Bloxham* v. *Saunders*, and several of the other cases, the goods were never out of the possession of the vendors. Supposing the defendants here to have had a lien, the sale was clearly a conversion, and renders them liable in trover. In *Jones* v. *Pearle*, 1 Str. 556, it was held that an innkeeper cannot sell his guest's horse for his keep, except in London, by custom.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—

Second count.

The second count in the declaration, upon which and the subsequent pleadings thereon the question before us arises, is a count in trover for six hundred quarters of wheat. The defendants plead to that count, that the plaintiffs had bargained to buy of the defendants, and the defendants had bargained to sell to the plaintiffs the wheat in question, under a certain agreement as to the payment of the price, which is set forth in the plea; that the defendants shipped the wheat on board a vessel, to be conveyed to Maidstone, and there delivered to the order of the defendants; and because the plaintiffs would not, on receipt of the invoice and bill of lading, remit or offer or tender to remit to the plaintiffs any bankers' draft on London, but wholly failed so to do, contrary to their said agreement, thereupon the defendants caused the wheat to be detained on board the said ship or vessel, and prevented the same from being delivered to the plaintiffs, as they lawfully might.

Plea thereto.

New assignment.

The plaintiffs new assign, and allege that they brought their action as stated in the second count, not for the grievance mentioned in the plea above referred to, but

because the defendants, without any bankruptcy or insolvency of the plaintiffs, and without any inability on their part to pay for the wheat, and before the lapse and expiration of a reasonable time for the plaintiffs to remit to the defendants a bankers' draft on London, "unlawfully did dispose of the said wheat to other persons than the plaintiffs, and to and for their own proper advantage and benefit, as their own absolute property, freed and discharged from all right, title, and interest of the plaintiffs."

The defendants plead to this new assignment two pleas; stating in the first, that the plaintiffs did not, on receipt of the invoice and bill of lading, remit, or offer or tender to remit to the defendants any bankers' draft on London, according to the contract, but failed and neglected so to do; whereupon the defendants, on their stoppage of the wheat, revoked and rescinded the sale of the same to the plaintiffs, and resumed as their own the property and dominion in and over the said wheat, and disposed of the same for their own advantage: and in the other plea to the new assignment the defendants state that the plaintiffs remitted to the defendants, instead of a bankers' draft on London, an acceptance of their own.

First plea to the new assignment.

Second plea.

To these pleas to the new assignment, the plaintiffs demur.

By the new assignment, therefore, the plaintiffs have altogether passed by the grievances justified by the defendants in their plea to the second count, that is, the stoppage of the wheat in transitu, and complain only of the rescinding of the contract by the defendants, and of the re-sale of the wheat by them to other persons than themselves the plaintiffs, forthwith upon their stopping of the said wheat, and before the lapse and expiration of a reasonable time for the plaintiffs to make such remittance according to the contract. And upon this state of the record we think it unnecessary to consider whether the pleas to the new assignment contain a legal justification or not, or to deter-

Effect of the new assignment.

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mine whether the defendants, upon the neglect of the plaintiffs to remit the draft upon the London bankers, had the right *forthwith* to rescind the sale; because it appears to us that the plaintiffs, under the circumstances pleaded and admitted on this record, are not in a condition to maintain an action of trover for the sale of the wheat: for, in order to maintain trover, the plaintiffs must not only have the right of property in the goods for which the action is brought, but the right to the possession also. And in this case, admitting that the contract of sale vested the property of the wheat in the plaintiffs, yet, before they acquired the right to the possession of the wheat, the plaintiffs were bound by the terms and conditions of the contract, upon the receipt of the invoice and bill of lading of the wheat, to remit to the defendants a bankers' draft on London, at two months' date, which they altogether failed to do. It was a condition obviously introduced for the security of the defendants, that they should not part with the possession of the wheat until the bankers' draft was remitted: and for this purpose the receipt of the invoice and bill of lading by the plaintiffs, and the remitting of the bankers' draft by them, are made by the terms of the contract concurrent acts; and, consequently, the entire failure in the performance of the latter act on the part of the plaintiffs, prevented the right of possession of the wheat from vesting in them. The plaintiffs, therefore, according to the decision of the court of King's Bench in *Bloxam* v. *Saunders*, 4 B. & C. 491, 7 D. & R. 396, with the facts of which case those of the present very nearly agree, cannot maintain an action of trover against the vendors for re-selling the goods, however they might have been able to have brought a special action upon the case against them for any damage sustained in consequence of the re-sale, without waiting a reasonable time for the remitting of the bankers' draft. And this meets the justice of the case; for, in such action, they would recover only the damages

Plaintiffs no right of possession of the wheat, the condition of the contract not having been complied with.

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Quære whether the plaintiffs might have brought case for the re-sale.

actually sustained in consequence of the re-sale, which might be very small, and not, as in an action of trover, the full value of the goods for which they had not paid according to the terms of the contract. We therefore give judgment for the defendants.

Judgment for the defendants.

JACKSON *v.* NICHOL and Another.

Wednesday, May 8th.

THIS was an action of trover brought by the plaintiff against the defendants for the recovery of the value of 284 cwt. 18lbs. of lead. The defendants pleaded, denying the plaintiff's property in the lead, whereupon issue was joined; and the cause was tried before Tindal, C. J., and a special jury, at the adjourned sittings after Michaelmas Term, 1837, when the jury found a verdict for the plaintiff for 304*l.* 9*s.* 2*d.* damages, subject to the opinion of the court upon the following case; with power to the court to draw inferences from the facts stated, in the same manner as the jury might have done. The pleadings were to be considered as part of the case, and might be referred to by the court or either of the parties:—

On the 12th October, 1836, Joseph Crawhall, a merchant at Newcastle-upon-Tyne, as agent on behalf of Thomas Maltby, Son, & Co., then carrying on the business of lead merchants and patent shot manufacturers in London, contracted with the plaintiff for the purchase of thirty-five

In October, 1836, one C., of Newcastle, as agent for M. & Co. of London, contracted with the plaintiffs for the purchase of a quantity of lead to be paid for by bill at six months from time of delivery. The lead remained in the plaintiff's possession until the 5th January, when the plaintiff gave C. a delivery order for it. On the 9th, it was accordingly delivered from the plaintiff's premises to a keelman in the employ of the owners of the Esk, a general trader between Newcastle and London, for the purpose of being put on board that vessel, and was by him put on board, the lighterage being paid by C. on account of M. & Co. An invoice of the lead was delivered to C., and C. transmitted to M. & Co. a bill of lading for it signed by the owners for the Captain of the Esk. The Esk arrived in London on the 21st January. The defendants, by M. & Co.'s orders, undertook the delivery of the lead. M. & Co. stopped payment on the 21st. On the 24th the lead was demanded on behalf of M. & Co., the freight being tendered: but both the captain of the Esk and the defendants refused to deliver it. On the 28th, the lead being in a lighter, and under the control of the defendants, it was stopped on behalf of the plaintiff:—Held, that the transitus was not ended at the time of the stoppage.

[illegible] the following is a copy of the letter:

[illegible]

[illegible]

[illegible] previous to the purchase. Crowhall had written to Maltby, Son, & Co. in the previous [illegible] on their account, and had shipped in their name in the year he had shipped to them a value from 6,000*l.* to 8,000*l.* worth of lead. It was usual in the mode of shipping for them lead to Ireland, France, and Holland as well as to London. His general course of trading is to ship the lead, when after he has purchased the lead it could be in the possession until he received directions from Maltby, Son, & Co. to ship it.

In the 8th October 1836 Crowhall wrote a long letter upon business to Maltby, Son, & Co., the following extract from which relates to the lead in question:—

"Mr. Jackson, of whom I purchased some old lead for you, has another parcel for sale, say thirty-five or forty tons, which he offers at 24*l.* *per fodder*, usual terms. I told him I thought that too high, but would forward it. Please say if you will buy, and at what price: and I will do the best I can."

On the 10th October, 1836, Maltby, Son, & Co. wrote to Crowhall, authorizing him to make the purchase. The following is a copy of that letter:—

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"We have received your's of the 8th October. We are scarcely disposed to make any purchases just now; but should not like Mr. Jackson's lead to be hanging on the market; and therefore authorize you to give 23*l.* per fodder for it, six months."

On the 12th October, 1836, Crawhall advised Maltby, Son, & Co. of the aforesaid purchase, by the following letter:—"I have yours of the 10th, and have bought thirty-five to forty tons of old lead of Mr. C. F. Jackson, at 10*s.* per fodder less than you limited, viz. 22*l.* 10*s.*, payable by bill at six months from delivery, which will be a month or two; the usual allowance to be made for tare."

Instructions as to forwarding the lead.

On the 4th November, 1836, Maltby, Son, & Co. addressed a letter from London, to Crawhall at Newcastle, containing the following paragraph relative to the lead in question:—"We shall be glad also if you will inform us when the old lead purchased some time since will be forwarded; for, the price declining as it has done, may render further delay in the delivery detrimental to us."

Crawhall had no direction about sending the lead to London, but the above. He had no instructions to send it any where when he bought it. The lead remained in the possession of the plaintiff at some copperas works about two miles distant from Newcastle, without any orders or directions from Maltby, Son, & Co., or Crawhall, from the time of the purchase until the 5th January, 1837, when at the request of Crawhall the plaintiff addressed to John Johnson, one of his workmen at the said coperas works, an order directing him to deliver the lead to the order of Crawhall, of which the following is a copy:—

Delivery order.

"Deliver to the order of Mr. Joseph Crawhall the old lead;" and on the 7th January, 1837, Crawhall, by his clerk, George Backhouse, made an order in writing for the delivery of the lead immediately below the above order, of which the following is a copy:—

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"Deliver the above to the bearer, to go on board the Esk, Purvis, Master, and furnish me with the particulars as early as possible."

The above orders were delivered by George Backhouse to Nichol, Ludlow, & Co., of Newcastle, who are wharfingers there, and owners of the Esk, a trader between Newcastle and London. Nichol, Ludlow, & Co., on the 9th January, 1837, gave the above delivery orders to Robert Gundry, a keelman, to go for the lead, and take it on board the Esk. Gundry got the lead on that day, and took it on board the Esk accordingly, and Gundry was paid for so doing by Mr. Graham, one of the firm of Nichol, Ludlow, & Co., who charged the same to Crawhall, by whom they were repaid; and Crawhall charged the same to Maltby, Son, & Co.

Shipment of the lead.

On the 9th January, 1837, the plaintiff sent to Crawhall an invoice of which the following is a copy:—

"Newcastle, 9th January, 1837.

Invoice.

"Messrs. Maltby, Son, & Co.

Drs. to C. F. Jackson.

	Cwt.	qrs.	lbs.
"To 215 pieces old lead, weighing - -	294	2	21
"Deduct tare, 4 lbs. per cwt. - - -	10	2	3
	284	0	18

"Fodders—13 11 18, at 22*l.* 10*s.* per fodder of 21 cwt. - - - - £304 9 2."

On the 14th January, 1837, Crawhall sent to Maltby, Son, & Co. a bill of lading of this and other lead, inclosed in a letter of which the following is a copy:

"Inclosed I hand you bills of lading for lead shipped to your address as above, which I trust you will receive safe in due course."

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The following is a copy of the bill of lading signed by Nichol, Ludlow, & Co., for the captain of the Esk :— Bill of lading.

"Shipped, by the grace of God, in good order and well conditioned, by Joseph Crawhall, in and upon the good ship called the Esk, whereof is master under God for this present voyage, John Purvis, and now riding at anchor in the river Tyne, and by God's grace bound for London, to say eight hundred and fifty-five pieces of lead, weighing 1244 cwt. 18 lbs., being marked as in the margin, and are to be delivered in the like good order and well conditioned at the aforesaid port of London, all and every the dangers and accidents of the seas and of navigation of whatever nature and kind soever excepted, unto the order of Thomas Maltby, Son, & Co., he or they paying freight for the said goods as customary, with average accustomed. In witness whereof the master or purser of the said ship hath affirmed to three bills of lading all of this tenor or date, the one of these bills being accomplished, the other two to stand void. And so God send the good ship to her destined port in safety. Amen. Dated in Newcastle, 14th January, 1837."

"640 pieces of lead weighing 960 cwt., and marked 'Derwent Mines Co.'

"215 pieces of old lead weighing 284 cwt. 18 lbs."

"Weight unknown."

The bill of lading was filled up by Backhouse, the clerk of Crawhall. The 215 pieces of old lead stated in the margin of the bill of lading, is the lead in question.

Arrival of the lead.

The Esk arrived at her moorings off the Tower of London, with the lead and a general cargo on board, on the 21st January, 1837. The lead could not have been unloaded before the 24th of that month. The ship did not deliver her cargo at any wharf, but, as on former occasions, delivered in the stream, a wharfinger undertaking the management of her delivery. In this instance, the defendants, who are wharfingers, by Maltby, Son, & Co.'s orders, undertook the delivery.

Defendants undertook to deliver it.

Failure of M. & Co.

Maltby, Son, & Co. stopped payment on the 21st January, 1837.

Demand and refusal.

On the 23rd January, 1837, Fishwick, the managing clerk at Maltby, Son, & Co.'s, on their behalf, made out an order for the captain of the Esk to deliver the lead for Maltby, Son, & Co., on board a lighter; and, on the next

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dup. Fishwick produced the bill of lading and the order to the mate on board the Esk, the captain not then being on board, and tendered the freight to him, and requested the delivery of the lead accordingly; but the mate said he could not deliver it, because the delivery had been stopped; and, as far as Fishwick recollected, the mate said it was stopped by the defendants. Thereupon Fishwick came away; and, on the 24th January, 1837, Fishwick served upon the mate on board the Esk, and also upon the defendants, the wharfingers, a demand of delivery of the lead, of which the following is a copy:—

"Frederick's Place, Old Jewry,
"Jan. 24, 1837.

"Gentlemen,—We are instructed by Messrs. Thomas Maltby, Son, & Co. to demand the delivery to them according to the bill of lading which they hold, of 855 pieces of lead their property, shipped on board the Esk, Purvis, Master, now arrived in the port of London. We, on their behalf, hereby offer to pay the freight for the said lead according to the bill of lading, and give you notice that you will be held responsible to Messrs. Thomas Maltby, Son, & Co. for the said lead, and all consequences of your refusal, if you persist in refusing to deliver the same.

"Swain, Stevens, & Co."

"To Captain John Purvis, and the owners of the Esk, and Messrs. Anthony Nichol & Son, and whom else it may concern."

Fishwick, at the times of such services, produced the bill of lading, tendered the freight, and demanded the lead; but they refused to deliver it, on account of the stoppage of payment of Maltby, Son, & Co.

On the 24th January, Bostock, the foreman to Mr. Drew, a lighterman, went in his barge, by the direction of Maltby, Son, & Co., alongside the Esk to receive the lead: he saw the mate of the Esk, and asked him if he had not on board

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the Esk some lead for Maltby, Son, & Co.; and the mate said that he had lead on board for them, but that he could not deliver it, as it was stopped by the defendants.

On the 26th January, 1837, the plaintiff, on hearing of the stoppage of payment of Maltby, Son, & Co., and not having been paid the price of the lead, applied to his attorney, Mr. John Brown, of Newcastle, who forwarded a letter by post to his correspondent Mr. W. W. Simpson, in London, of which the following is a copy:—"My friend Mr. C. F. Jackson lately sold to Thomas Maltby, Son, & Co., some old lead, through the medium of Mr. Joseph Crawhall, their agent. Part of this lead was shipped on board the Esk from here to London; and Maltby & Co. have failed. Mr. Jackson wishes, therefore, a notice to be given immediately to the captain, and Mr. Crawhall, if in London, and to the wharfinger, that he, as seller of the goods, claims to stop them in transitu (as we call it in law). Will you, therefore, be so good as to do this, and, if necessary, to employ a law man or some other broker. Whether the notice will eventually be available, is a matter for future consideration. Will you please write by return, informing me of what is done."

Stoppage of the lead.

On the same sheet of paper the plaintiff also wrote to the said W. W. Simpson a letter of which the following is a copy:—

"I request you will act on my behalf respecting the lead as stated below, and that you will take possession of the same for me; and what you do will be ratified by me.

"C. F. Jackson."

"1837. January. 215 pieces old lead, 294 cwt. 2 qrs. 21 lbs. shipped by the ship Esk, John Purvis, Master, from Newcastle to London. Shipped probably in the name of Crawhall, for Thomas Maltby, Son, & Co. Sold by C. F. Jackson."

Anthony Nichol & Son, the defendants, are wharfingers at Dowgate Wharf, and agents for the Esk in London.

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The letter arrived by the post on the 28th; and Simpson immediately proceeded to look after the lead, and found it in a lighter in the Thames by the order and under the control of the defendants, the wharfingers; and he thereupon went to the defendants at Dowgate Wharf, and shewed them the plaintiff's letter, and on the plaintiff's behalf demanded the lead of the defendants, and gave them notice not to deliver it to Maltby, Son, & Co. The defendants upon that occasion refused to deliver the lead to Mr. Simpson on behalf of the plaintiff, unless he (Simpson) would give them an indemnity.

Question.

The question for the opinion of the court was—Whether there was not a delivery to Maltby, Son, & Co., by the delivery by the plaintiff to the order of Crawhall, their agent, at Dent's Hole, or on board the Esk: and, if not—Whether, on the 23rd or 24th January, 1837, when the demands were made by Fishwick and Bostock, on behalf of Maltby, Son, & Co., the transit was not at an end: or whether, on 28th January, 1837, when the demand of the lead was made by the plaintiff's agent, it was in its transit from the plaintiff to Maltby, Son, & Co. If the court should be of opinion that there had been no such delivery to Maltby, Son, & Co., or that the transitus was not at an end on the 28th January, then the verdict for the plaintiff to stand; otherwise a verdict to be entered for the defendants.

Wightman, for the plaintiff.—The transitus was continuing on the 28th January, when the lead was stopped: it had not reached its ultimate destination; nor had it come to the possession of Matby & Co. either actually or constructively. Had it been delivered to Crawhall, and by him received, to await instructions from his principals to forward it to London, then, it must be admitted that the stoppage would have been too late: but there never was any delivery to Crawhall; he had no authority to receive the lead. In *Stokes* v. *La Riviere*, cited in *Ellis* v. *Hunt*, 3 T. R. 466, and

in *Bohtlingk* v. *Inglis*, 3 East, 398, Lord Mansfield says: 'No point is more clear than that, if goods are sold, and the price not paid, the seller may stop them in transitû; *I mean in every sort of passage to the hands of the buyers.*" In *Hodgson* v. *Loy*, 7 T. R. 440, it was held that the consignor's right to stop goods in transitû is not taken away by a part payment. In *Bohtlingk* v. *Inglis*, 3 East, 381, a trader in England chartered a ship on certain conditions for a voyage to Russia and to bring home goods from his correspondent there, who accordingly shipped the goods on account and at the risk of the freighter, and sent him the invoices and bills of lading of the cargo: and it was held that the delivery of the goods on board such chartered ship did not preclude the right of the consignor to stop the goods while in transitû on board the same to the vendee, in case of his insolvency in the meantime before actual delivery, any more than if they had been delivered on board a general ship for the same purpose: and, a demand of the goods having been made by the agent of the consignor upon the captain before they were unloaded, after which he delivered them to the assignees of the vendee; it was held that the consignor might maintain trover against the assignees. Here, whilst the goods were in the hands of the defendants, they were there only for the purpose of transit. In *James* v. *Griffin*, 1 M. & Welsby, 20, where goods, consigned to A. in London, and deliverable in the river, were by his direction, he being then insolvent, landed on a wharf at which he had been in the habit of landing goods, A. having no premises adjoining the river, but having a warehouse in the city: and the goods were stopped in transitû in the hands of the wharfinger: it was held, in an action of trover for the goods, by the assignees of A. (who became bankrupt a few days afterwards), against the wharfingers, that the proper question to be left to the jury was, whether the wharfingers received the goods as A.'s agents to take possession of them for his own benefit as

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owner, or as agents only to forward them to him, or to keep them for the seller; and that directions given by A. to an agent whom he sent to order the landing of the goods, in which he expressed his intention not to receive them as owner, were admissible in evidence, although they were not communicated to the wharfingers or to the seller. Alderson, B., there says: "To defeat the right of stoppage in transitû, one of two things must appear: either the goods must arrive at the natural end of their journey, in which case I should rather think the intention of the vendee had nothing to do with the question; or, if the transitus is to be put an end to by something intermediate, then it is material to consider what that was, and with what intention it was done." The question here is, was the delivery to the defendants a constructive delivery to Maltby & Co. If a hired cart were sent by the consignees to get the goods from a wharf at which they had been landed, the transitus would still continue until the goods were actually deposited in the consignees' warehouse. *Slater* v. *Le Feuvre*, 2 Scott, 146, 2 New Cases, 81, is hardly to be distinguished from this case. There, one Le Couteur, a trader in Guernsey, purchased goods of the plaintiffs, directing them to be forwarded to him at Guernsey. The goods were accordingly sent by waggon to Southampton, addressed "J. Le Couteur, Guernsey, care of W. S. Le Feuvre (the defendant), Southampton." The goods arrived at Southampton on the 10th May, and were taken from the waggon office by the defendant, who was the general shipping agent of Le Couteur at that port, and who paid the carriage, and shipped the goods for Guernsey on the 14th. On the 15th, a letter from Le Couteur to the defendant (written at the plaintiffs' request) was received by the clerk of the defendant at Southampton, requesting the defendant to delay the shipment of the goods; and on the same day one of the plaintiffs arrived there for the purpose of stopping the

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goods—the vendee being insolvent and in prison. Arrived at Southampton, the plaintiff went with the defendant's clerk on board the vessel in which the goods were, and caused them to be relanded and conveyed to the defendant's warehouse, the defendant's clerk giving the plaintiff a letter wherein he engaged on the defendant's behalf to hold the goods subject to the order of the owners:—It was held that the transitus of the goods was not ended on their arrival at Southampton and being taken possession of by the defendant, so as to entitle him to treat them as the property of the vendee, and hold them in assertion of a right of lien for the general balance due to him for business done for the vendee.

Bompas, Serjeant, for the defendants.—1. The stoppage was clearly too late. As between the vendor and vendee, the delivery was complete at Newcastle—the transit continues no longer than the arrival of the goods at the destination named in the contract. "The destination of the goods," says Tindal, C. J., in *Slater* v. *Le Feuvre*, 2 Scott, 156, "according to the terms of the contract, was Guernsey: consequently, the transitus would be at an end (with reference to the facts of this case) only on their arrival at that place." So, in *Coates* v. *Railton*, 6 B. & C. 422, 9 D. & R. 593, where goods were purchased by a commission agent at Manchester for A., to be sent to Lisbon; and A. having no warehouse at Manchester, the vendor delivered the goods to the commission agent, who was to forward them to Lisbon; it was held that the transitus continued until the goods reached Lisbon, the place named by the vendee to the vendor as the place of ulterior destination, and that the latter had a right to stop them in the hands of the agent, the vendee having become insolvent. The general rule there laid down by Bayley, J., is—"that, where goods are sold for the purpose of being sent to a particular place of destination named by the purchaser, the right of the ven-

1. The destination named in the contract terminates the transit.

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dor to stop them continues until they arrive at that place of destination." "In the several cases cited," he continues, "the goods were sent to the place where the purchaser directed them to be sent; and the principle deducible from those cases is, that the transitus is not at an end until the goods have reached the place named by the purchaser to the vendor as the place of their destination." Here, the lead was not purchased for London; it was purchased merely for the purpose of keeping it out of the market. Its transit was at an end by the order of delivery to the buyers' agent, Crawhall, at Newcastle. Maltby & Co. might have been sued for not receiving it there. The vendor had nothing to do with any ulterior destination. In *Leeds* v. *Wright*, 3 B. & P. 320, one Moisseron, the general agent in London of Le G. & Co. of Paris, with power to export for them to such markets as he should think fit (129), purchased goods in the name of Le G. & Co., of the plaintiffs, at Manchester, and directed them to be sent to the defendant, a packer in London: after their arrival, Moisseron had some of the goods unpacked and sent away, and the remainder repacked: news then arrived of the failure of Le G. & Co.: it was held that the goods in the defendant's hands were no longer in transitu, and that the plaintiffs therefore had no right to stop them. And in *Dixon* v. *Baldwen*, 5 East, 175, where B. & Son, traders living in London, were in the course of ordering goods of the defendants, cotton manufacturers at Manchester, to be sent to Metcalfe & Co. at Hull, for the purpose of being afterwards sent to the correspondents of B. & Son at Hamburgh: B. & Son sent orders to the defendants for certain goods *to be sent to Metcalfe & Co. at Hull, to be shipped for Hamburgh, as usual:* and it was held, that, as between the buyers and sellers, the right of the defendants to stop in transitu was at an end when the goods came to the possession of Met-

(129) This was the real ground of the decision.

calfe & Co. at Hull; for, they were for this purpose the appointed agents of the vendees, and received orders from them as to the ulterior destination of the goods; and the goods, after their arrival at Hull, were to receive a new direction from the vendees. Moisseron stood in the same relation to Le Grand & Co. in *Leeds* v. *Wright*, and Metcalfe & Co. to Battier & Son in *Dixon* v. *Baldwen*, as Crawhall does in this case to Maltby & Co. And see *Rowe* v. *Pickford*, 8 Taunt. 83.

2. Supposing the transitus did not end at Newcastle, it clearly did when the vessel arrived in the river ready to discharge her cargo, and the lead was demanded by the clerk of Maltby & Co., their lighter being alongside. The captain had no right to refuse to deliver it; "for," says Lawrence, J., in delivering the judgment of the court in *Boghtlingk* v. *Inglis*, 3 East, 394, "it shall never be permitted to a carrier, by not delivering the goods, to vary the property, and decide to whom they shall belong." *Ellis* v. *Hunt*, 3 T. R. 464, is an authority to the same effect.

3. The delivery on board the lighter was a delivery to Maltby & Co., the defendants having received it under the orders of Maltby & Co.: it was the same as a delivery to their own waggon.

Wightman, in reply.—There was never any actual delivery of the lead: its ultimate destination was the warehouse of Maltby & Co. Crawhall was only their agent to forward it; and the lead was as liable to be stopped while in the lighter of Nichol & Co., as while on board the Esk. The case clearly falls within the principle of *Boghtlingk* v. *Inglis*, *Stokes* v. *La Riviere*, *Slater* v. *Le Feuvre*, and *James* v. *Griffin*.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—The first question that arises upon this special case, is,

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whether the transitus was at an end by the delivery of the lead from the premises of the plaintiff to the order of Crawhall, the agent of the buyers, or by the putting the same on board the Esk: and upon this question we are of opinion that the transitus was not determined on either of those occasions.

General rule.

The general rule is, that the transitus is not at an end until the goods arrive at the actual or constructive possession of the consignee. And if the lead had been delivered into the possession of Crawhall as the agent of the buyers, there to remain until Crawhall received orders for their ulterior destination, such possession of Crawhall would have been the constructive possession of the buyers themselves, and the right to stop in transitu would have been at an end. The case would then have fallen within the principle laid down in *Dixon* v. *Baldwen*, 5 East, 174. But, upon the facts stated in this special case, the lead in question never came into the actual possession of Crawhall, the agent; for, on the 9th January, 1837, it was delivered from the premises of the plaintiff, the seller, to a keelman in the employ of the defendants, for the purpose of being put on board the defendants' vessel, the Esk, a general trader between Newcastle and London, and by him was so taken and put on board accordingly. Neither, again, does Crawhall appear to have been an agent of the buyer for the purpose of receiving the lead into his possession, either as a place of deposit until he received directions from the buyers for its ulterior destination, or for sending it on to the buyers under general directions for that purpose; for, whatever may have been his course of dealing on former occasions, in this particular transaction he acted on and was clothed with no other authority than that which he derived from the letter of the buyers dated the 4th November, 1836; that is, merely upon a desire expressed in that letter, that the lead should be forwarded without delay. And we think the order given by the plaintiff to deliver

the lead to the order of Crawhall, and the subsequent order by Crawhall "to deliver it to the bearer (who was the keelman) to go on board the Esk," did not amount to any taking possession by Crawhall, but merely formed a link in the chain of the machinery by which the lead was put in motion, and in a course of transmission from the seller's premises in Newcastle to the buyers in London: the legal consequence being precisely the same as if the order to forward the lead had come direct from the buyers to the seller, instead of circuitously through Crawhall's hands; and further, that the putting of the lead on board the Esk was only a continuance of such transitus.

The second question is, whether the transitus was at an end at the time the stoppage took place in the river, that is, on the 28th January. As to which the facts are, that, after the Esk had arrived with the lead on board at her moorings in the river Thames, the lead was put on board a lighter for the purpose of being carried to the defendants' wharf. On the 28th January the demand was made on behalf of the plaintiff, the lead being at that time on board the lighter, and the defendants' servants refused to deliver it. It is left in some degree of uncertainty upon the statement of the case, whether the defendants' refusal to deliver the lead proceeded from any adverse claim which they had against Messrs. Maltby & Co., the buyers, or whether it was simply a refusal to deliver as holding the lead for Maltby & Co.: but we think in either case the plaintiff's right of stoppage still existed; for, as the right of the vendor to stop in transitu is not defeated by any claim of the carrier for his lien for a general balance, or even by a foreign attachment laid upon the goods by a creditor—*Oppenheim* v. *Russell*, 3 B. & P. 42—it follows, that, if any claim of lien for a debt due to the defendants existed, of which there is no statement in the case, it could not operate to defeat the plaintiff's right; and, if the goods were in the lighter not being subject to any such claim, they were

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still in a course of transitus in order to be delivered, and were not actually delivered to the buyer, notwithstanding the defendants undertook the delivery by the order of Maltby & Co.

It was urged, on the part of the defendants, on the authority of the dictum of Lawrence, J., in *Boghtlingk* v. *Inglis*, 3 East, 394, that the tortious act of a third person should not prejudice the rights of the parties: and, consequently, that the demand made by Fishwick, the clerk of Maltby & Co., on the 24th, and the unlawful refusal to deliver, was tantamount to a delivery. But it is to be recollected, in the first place, that the observation of Mr. Justice Lawrence was made in the case of a demand by the consignor for the purpose of revesting his property in the goods, and not in the case of a vendee. And, in the second place, that here the goods had not actually reached the terminus of their delivery when the demand of the vendee took place; and, although it might be conceded to be the better opinion, that, if the vendee actually receives the possession of the goods on their passage to him, and before the voyage has completely terminated, that the delivery is complete, and the right of stoppage gone; yet no authority has been cited for the position, and the principle seems the other way, that a mere demand by the vendee, without any delivery, before the voyage has completely terminated, deprives the consignor of his right of stoppage.

On the whole, we think the transitus was not at an end when the stoppage took place, and that the verdict must be entered for the plaintiff.

Judgment for the plaintiff.

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THORNTON *v.* JENYNS and Others.

Wednesday, May 8th.

The court refused to change the venue from Cambridge to Norfolk, upon an affidavit stating that the plaintiffs were gentlemen of property and influence in Cambrigdeshire, that one of them was member for the county, and that a large portion of the property in the county was liable to the rates imposed by the Bedford Level Corporation—the action being brought for the breach of a contract made with the corporation for works on the level.

THIS was an action brought against two of the commissioners of the Bedford Level, to recover damages for the breach of a contract for certain work to be done by the plaintiff at a place called Denver Sluice, within the jurisdiction of the corporation of the Bedford Level. The venue was originally laid in Norfolk, but was changed at the instance of the defendants, upon the usual affidavit, to Cambridgeshire.

Kelly, on a former day, obtained a rule nisi, on the part of the plaintiff, to restore the venue to Norfolk, upon an affidavit stating that the defendants were gentlemen of property and influence in Cambridgeshire, that one of them was member for the county, and that a large portion of the property in Cambridgeshire was liable to the rates imposed by the Bedford Level Corporation.

Wilde, Serjeant, now shewed cause.—This is not like the case of an action for a libel or slander arising out of an election or any subject of strong feeling, political or otherwise, as in *Petyt* v. *Berkeley*, Cowp. 510, and *Pybus* v. *Scudamore*, Ante, p. 124. Some more specific ground should be shewn to induce the court to interfere. The circumstance of one of the defendants being the county member is clearly no ground for saying that he shall not try his cause in his own county. In *Davies* dem., *Lowndes*, ten., 6 Scott, 435, 4 New Cases, 711, this court refused to direct the jury process on the trial at bar of a writ of right for the recovery of lands in Buckinghamshire, to be awarded to the sheriff of Middlesex, upon a suggestion that the tenant was possessed of large pro-

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perty and great popularity and influence in the former county, and the demandants poor and obscure persons resident in Wales. And in *Doe* d. *Williams* v. *Lloyd*, Ante, p. 143, 5 New Cases, 205, the court refused to change the venue from Radnor to Hereford, on the ground that the number of special jurymen in the former county did not exceed twenty-nine.

Kelly and *Byles*, in support of the rule.—The commissioners of the Bedford Level are selected from amongst those who possess property in the district over which their jurisdiction extends, and the expenses are defrayed by rates collected from the landowners in the several counties that are benefited by the drainage. And it may be that the costs of this action may be charged upon these persons. The courts will never allow a cause to be tried in a county upon the rate raised in which the damages and costs may in one event be charged. In *Davies* dem., *Lowndes*, ten., and in *Doe* d. *Williams* v. *Lloyd*, the court very properly refused to interfere: to have changed the venue in those cases would in effect have been saying that in future no gentleman of property shall have a cause tried in his own county, and that no special jury cause should again be tried in Radnor.

TINDAL, C. J.—If it had been made to appear to us that the jury in this case must of necessity be selected from amongst those who would be called upon to contribute to the costs, in the event of the plaintiff obtaining a verdict, the case would have been like that of a trial touching the liability to repair a bridge, or the like, where the burthen must fall upon the county rate; and in that case we should probably have acceded to this application. But nothing of the sort is shewn. I see no ground for changing the venue.

QUEET, J.—To make this rule absolute would be making a very mischievous precedent.

The rest of the court concurring—

Rule discharged.

BARRETT *v.* PARTINGTON.

Wednesday, May 8th.

The defendant gave a cognovit for 100*l.*, with a stipulation that judgment should not be entered up till default should be made in payment of the debt, 72*l.* 2*s.*, with costs to be taxed &c., on the days therein specified—by instalments:—Held, that the plaintiff was not bound to tax the costs before signing judgment, on a default.

THE defendant gave a cognovit for 100*l.* (in an action for the amount of an attorney's bill), with a defeazance that no judgment should be entered up unless and until default should be made in payment of the sum thereby secured (72*l.* 2*s.*, being the debt for which the action was brought), together with costs to be taxed by the Master as between attorney and client, on the days and times and in the manner therein specified—by instalments; but, in case default should be made in the due payment of any one or more of the aforesaid instalments, then and in such case, immediately on such default being made, the plaintiff was authorized to enter up and sign final judgment thereon, and to issue execution for the whole of the said sum of 72*l.* 2*s.*, with the costs aforesaid, or such part thereof as should remain unpaid at the time of such default, together with all costs of such judgment and execution &c. Default having been made in payment of an instalment, the plaintiff signed judgment for the balance due.

Petersdorff, on a former day in this term, obtained a rule nisi to set aside the judgment and subsequent proceedings, for irregularity, with costs.—He submitted that the plaintiff should have delivered a bill, and given the defendant an opportunity to tax it, before he signed judgment. He cited *Wilson* v. *Northern*, 4 Dowl. 212, where it was held that a judgment signed upon a cognovit before the costs are taxed is irregular; and *Booth* v. *Lady Hyde Parker*, 3 M. & Welsby,

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54, 6 Dowl. 87, where the defendant gave a cognovit whereby it was stipulated that no judgment should be entered up thereon, unless default should be made in payment of the debt, with interest, *and costs*, on the 9th November; and, in case the defendant made default in payment as aforesaid, the plaintiff was to be at liberty to enter up judgment and proceed to execution, and take the whole of the said debt and costs, *together with the costs of such judgment and execution:* and it was held that no default could be made by the defendant until the plaintiff had furnished her with a bill of the costs, and given her notice of taxation; and, not having done so, that judgment signed on the 10th November was irregular, although the defendant had paid no part of either the debt or costs. Parke, B., there says: "The question is, whether, on the terms of the cognovit, the defendant was bound to make two tenders, one of the debt, and another of the costs when taxed. I think she was bound only to make one tender of one entire sum, viz. the debt and the costs of the action as between attorney and client. To enable her to do this, the plaintiff was bound to go through the form of ascertaining the costs by taxation, and to give the defendant notice of it; then, if she omitted to pay either the debt or costs, the cognovit would be forfeited. No doubt the plaintiff may give up the costs; but, if so, he must give the defendant notice to that effect, and then he would be entitled to judgment on default in payment of the debt."

Bompas, Serjeant, now shewed cause.—Whether or not it is necessary to deliver a bill and tax the costs, depends upon the language of the cognovit itself. Here, it is provided that the plaintiff shall be at liberty to sign judgment for the debt, on default in payment of any one of the instalments. It was not necessary to wait for a default in payment of the costs. The judgment is signed for the balance due; the costs will be taxed afterwards. In

Booth v. *Lady Hyde Parker*, judgment was not to be entered up unless default should be made in payment of the debt, interest, and costs, on a given day; and the amount was not ascertained. And in *Wilson* v. *Northern*, there was an express stipulation, that, if the debt was not paid, *the costs were to be taxed and judgment signed.* Here, it is provided that judgment shall be signed on default in any one payment. No taxation of the costs was necessary.

Petersdorff, in support of his rule.—The defendant is entitled to information as to the precise amount he is required to pay, before the judgment is signed. The cognovit being given to secure debt *and costs*, how could the defendant discharge himself by a tender? The case is not distinguishable from *Booth* v. *Lady Hyde Parker*, save that there the payment was to be in one sum; here, by instalments, the whole to become due on one default. [*Bosanquet*, J.—The judgment is signed for the penalty mentioned in the cognovit.] Both the cases cited are in principle the same as the present.

TINDAL, C. J.—The language of the cognovit in this case differs from that in *Booth* v. *Lady Hyde Parker*. Here, the sum secured is to be paid by certain instalments on given days; and the plaintiff is restrained from entering up judgment until default should be made in any one of such payments. Default has been made, and judgment has been entered up. The plaintiff was clearly entitled to enter up judgment for the penalty, and to issue execution for the balance of the debt, and the costs when taxed. Judgment must be entered up before the plaintiff is entitled to have his costs taxed.

The rest of the court concurring—

Rule discharged.

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The plaintiff purchased a horse of the defendant, with a warranty of soundness, and sold it with a like warranty to J. S.; some months afterwards J. S. returned the horse, finding it to have been unsound at the time of the sale; the plaintiff declining to take it back, J. S. brought an action on the warranty; the plaintiff gave the defendant notice that the horse was returned to him as unsound, and an action brought; the defendant disregarding this notice, the plaintiff defended the action brought against him by J. S., and failed. In an action against the defendant on his warranty —the jury finding that the plaintiff might, by a reasonable examination of the horse, have discovered that it was unsound at the time he sold it to J. S.: —Held, that the plaintiff was not entitled to recover as special damage the costs incurred by him in the defence of the former action, su defence being under the circumstances rash and improvident.

WRIGHTUP *v.* CHAMBERLAIN.

THIS was an action upon the warranty of a horse. The declaration assigned for special damage that the plaintiff, confiding in the defendant's warranty, re-sold the horse to one Jolly with a warranty; and that, the horse proving unsound, Jolly sued the plaintiff, and recovered 39*l.*, the price of the horse, and 96*l.*, the costs of that action.

The defendant paid into court 19*l.*, the price for which he had originally sold the horse to the plaintiff.

The cause was tried before Parke, B., at the Norwich Spring Assizes, 1838. The facts that appeared in evidence were as follow:—On the 3rd September, 1836, the horse in question was sold by the defendant to the plaintiff for 19*l.*, with a warranty of soundness. On the 24th of the same month, the plaintiff sold it to Jolly for 39*l.*, with a like warranty. On the 17th July following, Jolly offered to return the horse to the plaintiff, alleging that it was unsound at the time of the sale. The plaintiff refusing to take it back, Jolly, on the 18th August, commenced an action against him on his warranty. The plaintiff afterwards took the horse back, and gave the defendant notice that the horse had been returned and the action brought, and that he should hold him responsible for the result. The defendant refusing to take back the horse, the plaintiff defended Jolly's action, which resulted in a verdict and judgment against him for 135*l.*—39*l.*, the price of the horse, and 96*l.* for Jolly's costs: which sum, and 30*l.*, the costs of his defence to that action, the plaintiff now claimed to be entitled to recover from the present defendant. There was no direct evidence that the horse was unsound at the time of tl respective sales by the defendant to the plaintiff and b the plaintiff to Jolly: but it was proved, that, when th

horse was returned by the latter, upon a strict examination, a defect of long standing was discoverable.

On the part of the defendant, it was contended, that, inasmuch as the plaintiff might, by examination of the horse, have discovered the unsoundness, his defence of Jolly's action was heedless and improvident, and therefore the present defendant was not chargeable therewith.

On the other hand, it was submitted that the defendant's refusal to take back the horse after it had been returned by Jolly, left the plaintiff no option, but compelled him to defend—*Lewis* v. *Peake* (or *Peat*), 7 Taunt. 153, 2 Marsh. 431; *Neale* v. *Wyllie*, 5 D. & R. 442, 3 B. & C. 533; *Smith* v. *Compton*, 3 B. & Ad. 407.

Under the direction of the learned judge (130), a verdict was found for the defendant, with liberty to the plaintiff to move to enter a verdict for the sum claimed, if the court should be of opinion that the special damage was recoverable. By agreement it was to be taken that the jury had found—first that the plaintiff had only agreed to take the horse back from Jolly, on condition that the defendant would take it back from him—secondly, that the plaintiff might, before he defended Jolly's action, have ascertained, by a reasonable examination of the horse, that it was not sound—thirdly, that the damages did not exceed 19*l.*, unless the plaintiff was entitled to recover the damages

(130) His lordship referred to a MS. note of a case of *Boucher* v. *Gwillim*, K. B., June 25th, 1829. The action was brought upon a warranty on the sale of a horse, the plaintiff claiming as special damage the costs of the defence of an action brought against him on a warranty upon the re-sale of the horse. It appeared that the plaintiff had been told by a third person before he defended the action brought against him by the party to whom he had sold the horse, that he could prove that the animal was unsound whilst it was in his possession. The jury having given full damages, the court directed a new trial, unless the plaintiff would consent to reduce the verdict to 90 guineas, the price paid for the horse. The plaintiff declining to consent, a new trial was had. On the second trial, there being no proof of unsoundness, the defendant had a verdict.

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and costs recovered against him by Jolly, or his own costs of the defence to that action.

Storks, Serjeant, in Easter Term last, accordingly obtained a rule nisi.

R. V. Richards and *Gurdon*, shewed cause (131).—The special damage claimed is clearly not recoverable: the plaintiff ought not, under the circumstances, to have defended Jolly's action. Nothing is more clear than that, where a chattel is sold with a warranty, and it turns out to be different from the thing warranted, the vendee may rescind the contract (132)—*Gompertz* v. *Denton*, 1 C. & M. 207, 1 Dowl. 623, 3 Tyr. 233; *Street* v. *Blay*, 2 B. & Ad. 456; *Patteshall* v. *Tranter*, 3 Ad. & E. 103. To entitle the plaintiff to recover special damages, the plaintiff must shew the act of the defendant to have been the natural and proximate, and not the remote cause of the damage. *Neale* v. *Wyllie* and *Smith* v. *Compton* turned upon the meaning in the special contracts. In *Fisher* v. *Fellowes*, 5 Esp. 171, the defendant being arrested, the plaintiff and another person justified bail for him; the defendant absconded, and the bail employed a person to go in search of him; the party so employed demanded a sum of 12*l.* 12*s.* for his trouble and expenses, which not being paid, he sued the present plaintiff, who defended the action, but was ultimately compelled to pay the demand with costs: and it was held that, though the plaintiff was entitled to recover from the defendant (the bail) the expenses necessarily incurred in his apprehension, yet he could not charge him with the costs incurred in his

(131) Cause was shewn at the Sittings in Banc after last Hilary Term, before Tindal, C. J., Vaughan J., and Erskine, J.

(132) This, though the common phrase, is hardly a correct expression: the purchaser cannot be said to rescind the contract by refusing to receive an article different from that which he contracted for; it is in truth a failure on the part of the vendor to perform the contract.

improvident defence of the former action. So, here, the jury having found that the defendant might, by the exercise of ordinary prudence, have discovered that the horse was unsound at the time he sold it to Jolly, the defence of that action was improvident and improper.

Storks, Serjeant, in support of his rule.—The question here is not whether Jolly had a right to return the horse, but whether the defence to Jolly's action was, under the circumstances, wanton, unreasonable, or speculative. An opportunity was given to the defendant to take back the horse or to defend the action. Notice, indeed, was not necessary. [*Tindal*, C. J.—How do you shew any act of the defendant to fix him with the costs of your defence to Jolly's action?] By paying into court the price paid to him for the horse, the defendant admits that it was unsound at the time he sold it to the plaintiff. In *Lewis* v. *Peake*, it was expressly held, that, if the buyer of a horse with warranty, relying thereon, resells him with warranty, and being sued thereon by his vendee, offers the defence to his vendor, who gives no directions as to the action, the plaintiff, defending that action, is entitled to recover the costs thereof from his vendor, as part of the damage occasioned by *his* breach of warranty. *Green* v. *Greenbank*, 2 Marsh. 485, was a decision to the same effect. In *Neale* v. *Wyllie*, where the assignee of an underlease containing a covenant to repair, suffered the premises to go out of repair, and the original lessor brought an action against the original lessee for the breach of a similar covenant contained in his lease; it was held that the damages and costs of that action, and also the costs of defending it, might be recovered as special damages in an action against the undertenant for the breach of *his* covenant to repair. "Unless," says Abbott, C. J., "the plaintiff can recover those costs in this action, as well as the damages, he will be without remedy for an injury induced by the defendant's

breach of warrant. In Smith v. Compton the defendant warrant promises to the plaintiff that a certain horse was sound, an action of formedon was afterwards brought against the plaintiff by a party having better title, and the plaintiff compromised it for 50*l.*: and it was held that the plaintiff, in an action for the breach of warrant, might recover the whole sum so paid, and his costs as between attorney and client in the compromised suit, *though he had given no notice of that suit to the defendant*: for, in an action on a general guarantie, the only effect of such want of notice to the indemnifying party, is, to let in proof on his part that the compromise was improvidently made. The want of notice there was not relied on as a defence in law, but was used as an answer on the merits. If notice was necessary, the defendants have had reasonable notice.

Cur. adv. vult.

TINDAL, C. J.—The only question in this case was, whether or not the plaintiff was entitled to recover as special damage the costs incurred in the defence of the action brought against him by Jolly for the breach of his warranty. The real point at the trial was, whether or not the plaintiff might have known, by a reasonable examination of the horse, before he defended the action, that the animal was unsound at the time he sold it to Jolly; for, if so, the defence was a rash one, and the plaintiff not entitled to charge the defendant with the costs of such improvident defence. Mr. Baron Parke reports to us that the plaintiff might by a reasonable examination have discovered the unsoundness, and that the 19*l.* paid into court was a sufficient sum to cover the plaintiff's demand; and so the jury have found. We therefore think the rule must be discharged.

Rule discharged.

END OF EASTER TERM.

IN THE COMMON PLEAS.

TRINITY TERM, 2 VICTORIÆ.

THE JUDGES WHO SAT IN BANC DURING THIS TERM WERE— TINDAL, C. J., VAUGHAN, J., COLTMAN, J., AND ERSKINE, J.

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Wednesday, May 22nd.

JAMES *v.* LINGHAM and Another.

The plaintiff by his declaration demanded 100*l.* for work and labour, 100*l.* for money paid, and 100*l.* for money due upon an account stated, and in his particular claimed 96*l.* 17*s.* 11*d.* as the balance of the account: the defendants pleaded, that, after the 100*l.* in the declaration mentioned became due from them, and after the accruing of the causes of action in respect thereof, they paid 100*l.* to the plaintiff, and he received the same, in full satisfaction and discharge: the plaintiff traversed the plea; and at the trial it appeared that the defendants had paid 100*l.* on account, and that a balance of 96*l.* 17*s.* 11*d.* remained due:— Held, that the plea was not proved; and that it was not necessary for the plaintiff to new assign.

THIS was an action of debt. The plaintiff by his declaration demanded 100*l.* for work and labour as an attorney, 100*l.* for money paid, and 100*l.* for money found due upon an account stated. By his particular of demand he claimed 96*l.* 17*s.* 11*d.* as a balance due after credit given for 100*l.* received on account.

The defendants pleaded—first, that they were never indebted—secondly, that, after the 100*l.* in the declaration mentioned became due from the defendants, and after the accruing of the said causes of action and each of them to the plaintiff in respect thereof, and before the commencement of the suit, the defendants paid to the plaintiff divers sums of money amounting in the whole to the said sum of 100*l.*,

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in full satisfaction and discharge of the same, and of all damages sustained by the plaintiff by reason of the detention thereof; which said sums of money the plaintiff accepted in such satisfaction and discharge as aforesaid—verification.

The plaintiff joined issue on the first plea, and replied to the second, that the defendants did not pay the plaintiff the said sum of 100*l.* in full satisfaction and discharge of the said debt due from the defendants as aforesaid, and of the damages by him sustained by reason of the detention thereof, nor did he accept the said sum of 100*l.* in full satisfaction and discharge of the said debt and damages.

The cause was tried before Bosanquet, J., at the sittings in London in Trinity Term last, when, the plaintiff having proved an admission of his demand to the precise amount claimed by the particulars, the defendants sought to sustain their second plea by shewing by the cross-examination of the plaintiff's witnesses that various payments had been made by them to the plaintiff on account, amounting in the whole to 100*l.*; and it was thereupon submitted on their behalf that the plea was proved, and that, if the plaintiff intended to go for anything beyond the 100*l.*, he should have new assigned; and *Hall* v. *Middleton*, 4 Ad. & E. 107, 5 N. & M. 410, was cited.

The learned judge, however, entertained a different opinion, and directed a verdict for the plaintiff, with liberty to the defendants to move to enter a nonsuit if the court should think the objection well founded.

Crowder, in Trinity Term last, accordingly obtained a rule nisi, upon the authority of the case cited at the trial—*Hall* v. *Middleton*. There, in assumpsit for money lent, payment was pleaded; the plaintiff new assigned, and non assumpsit was rejoined: the plaintiff at the trial claimed 15*l.* for money lent in August, 1833, and proved an acknowledgment by the defendant after that time that he

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owed the plaintiff 15*l.*: the defendant gave evidence of his having paid the plaintiff 15*l.* in October, 1833: the undersheriff, in summing up, stated the question for the jury to be, whether or not the 15*l.* said to have been lent in August, 1833, had been so lent: the plaintiff had a verdict: on motion for a new trial or to enter a verdict for the defendant, it was held, that the proper question for the jury was, whether or not there had been two debts, that the defendant was not precluded from taking this point by the evidence of payment which he had produced at the trial, and that, there having been some evidence of a second debt, a new trial must be had.

F. Kelly and *James* now shewed cause.—The point is an extremely plain and simple one. The action is brought to recover the balance of an attorney's bill. The declaration contains the usual counts, in each of which the sum demanded is 100*l.*; and the particular claims a balance of 96*l.* 17*s.* 11*d.* The defendant pleads payment and receipt of 100*l.* in full satisfaction of the causes of action mentioned in the declaration. Upon this state of the record, it is idle to say that the plaintiff was bound to new assign. *Hall* v. *Middleton* is wholly beside the case. But *Freeman* v. *Crafts*, 4 M. & Welsby, 4, is exactly in point. There, in debt for work and labour, &c., the aggregate of the sums stated in the declaration being 30*l.* (10*l.* for goods sold and delivered, 10*l.* for work and labour and materials, and 10*l.* on an account stated), the defendant pleaded payment of divers sums of money amounting in the whole to the amount of all the debts and monies in the declaration mentioned: the defendant proved payments to the amount of 92*l.*, but the plaintiff proved work done to the amount of 107*l.*; and it was held that the plaintiff was entitled to a verdict for the balance, and was not bound to new assign. "It is," said Alderson, B., "like the plea of licence in trespass, where the defendant must prove a licence for every trespass the plain-

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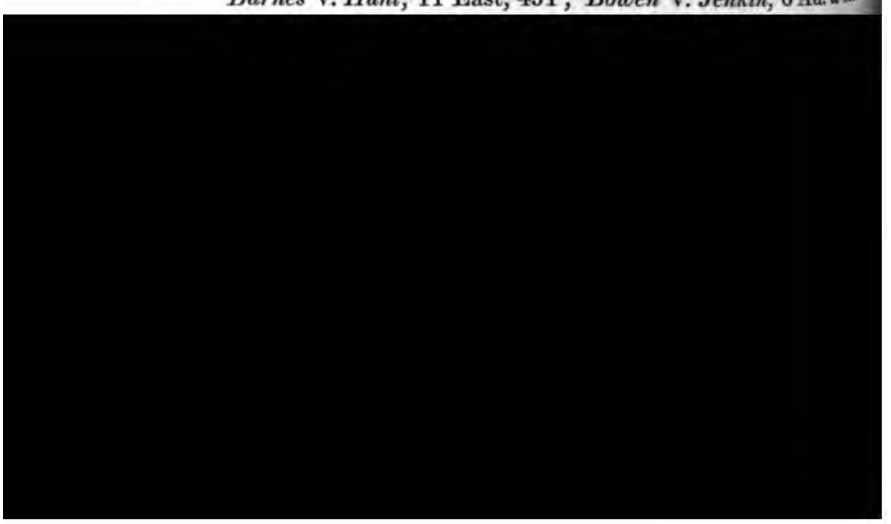
tiff can prove. So, in a plea of payment, you undertake to prove that whatever demand the plaintiff can establish you have paid him. No new assignment was therefore necessary." Here, the plea was not proved: the defendants only proved that they had paid something which the plaintiff did not claim. A new assignment perhaps would not have been objectionable; or, possibly, the plaintiff might have obtained leave to increase the damages laid in the declaration, as was done in *Collins* v. *Aaron*, 5 Scott, 595, 4 New Cases, 233: but neither course was absolutely necessary.

Crowder and *Bayley*, in support of the rule.—In the absence of a particular of the plaintiff's demand, the necessity of a new assignment in this case would be perfectly unquestionable: the practice of new assigning is not confined to trespass; it is equally applicable to debt or assumpsit—*Heydon* v. *Thompson*, 1 Ad. & E. 210, 3 N. & M. 319. Here the declaration is in general terms. The plea undertakes to point out a particular debt of 100*l.* which has been satisfied; if the plaintiff intended to go for any other debt, he clearly should have new assigned. The only use of the new assignment is, where the plea appears to answer, but in fact does not completely answer the declaration—*Barnes* v. *Hunt*, 11 East, 451; *Bowen* v. *Jenkin*, 6 Ad. & E.



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is not joined: upon a record framed like this, he ıt be shut out from his plea in abatement. The point not very much considered in *Freeman* v. *Crafts:* but ' v. *Middleton*, 4 Ad. & E. 107, 5 N. & M. 410, is a strong ıority in support of this view. In *Nicholl* v. *Williams*, . & Welsby, 758, in assumpsit for use and occupation, sum stated in the declaration being 105*l.*, the plaintiff vered particulars as follows:—"The plaintiff seeks to ver in this action the sum of 52*l.* 10*s.*, being *the balance ne year's rent* due from the defendant for the occuon of a farm &c., which he quitted on the 2nd Febru- 1833:" the defendant afterwards pleaded, as to all 52*l.* 10*s.*, non assumpsit; as to 52*l.* 10*s.*, residue, pay- ıt: the plaintiff joined issue on the plea of non assump- and entered a nolle prosequi as to the plea of payment: he trial, the plaintiff having proved an occupation for ral years, at a rent of 105*l.* a year, the defendant proved ment of all the rent: and it was held that the plaintiff nevertheless entitled to a verdict for nominal damages. n, the particulars of demand make no difference as the rules of pleading. It is said by Patteson, J., in th v. *Howard*, 5 Dowl. 441, "that particulars of demand not to be considered as incorporated with the declara- ı: they are intended for the benefit and information of defendant." And such had previously been the opinion ittledale, J., in *Meager* v. *Smith*, 4 B. & Ad. 673, 1 N. I. 449; and has since been held by the court of King's ıch in *Ferguson* v. *Mahon*, 1 P. & D. 194. Before the rule, Trinity Term, 1 Victoriæ, a defendant could not l himself of payments credited in particulars of demand, ıout pleading payment (134).

34) The rule referred to was ed to obviate the difficulties d by the following cases:— s v. Stevens, 2 C. M & R. 5 Tyr. 764; Booth v. Howard, wl. 438; Shirley v. Jacobs, 2 Scott, 157 (and the cases there cited), 2 New Cases, 88; Nicholl v. Williams, 2 M. & Welsby, 758; Kenyon v. Wakes, 2 M. & Welsby, 764; Ernest v. Brown, 4 Scott, 385, 5 Scott, 491, 3 New Cases, 674.

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TINDAL, C. J.—This appears to me not to be a case in which the plaintiff should be compelled to new assign. The object of a new assignment is, to reduce to certainty that which the plea leaves uncertain; that is, where the defendant has mistaken, or affects to have mistaken, the plaintiff's demand, and has addressed his plea to something that is not the cause of action: in that case the plaintiff must new assign. The common case is that of an action for an assault, as put in Stephen on Pleading, 221: or, suppose two assaults have been committed, one of which has been the subject of compensation, and an action is brought for the other, the declaration being general, the defendant may plead the compensation, which being a good answer on the face of it, the plaintiff could not safely take a traverse upon it; he must therefore new assign, in order to point his declaration to the assault which was not the subject of compensation. So, "where the defendant has committed several trespasses either upon the person, goods, or land of another, some of which are justifiable, and others not, and the action is brought for those trespasses which are *not* justifiable, but the defendant by his plea answers those only which *are*, the plaintiff by his replication should make a new assignment"—1 Wms. Saund. 299 *a*, n. (6). It is evident, therefore, that the doctrine only applies where there is a mistake, actual or assumed, as to the identity of the cause of action. In the present case, however, there never was any doubt but that this action was brought to recover the balance of the account: there was but one existing cause of action. What then could be the use of a new assignment? Taking the record as it stands, the case seems to me to fall precisely within that of *Barnes* v. *Hunt*, 11 East, 451. There, to a declaration for several trespasses on the plaintiff's land on divers days &c., the plea alleged, that, at the said several days &c., the defendant committed the said several trespasses by licence of the plaintiff; and the latter replied that the defendant of his own wrong, and

without the cause alleged, committed the said several trespasses &c.: it was held that evidence of a licence which covered some but not all of the trespasses proved within the period laid in the declaration, did not sustain the justification upon the issue taken by the replication. Bayley, J., there says: "The declaration is general, complaining of trespasses on divers days within a certain period. The defendant undertakes to meet that general and indefinite charge, and says, in effect, that, whatever may be the number of trespasses that the plaintiff complains of within that period, he is prepared to shew as many licences. The replication states that the defendant at the said several days committed the said several trespasses of his own wrong, and without the cause alleged. What does that put in issue but that the defendant had a licence to cover all those trespasses? Then, in common sense and understanding, we must take it that *the cause* put in issue by the replication, is, that the defendant had not a licence co-extensive with the trespasses complained of: and a new assignment could have done no more than repeat the same thing." So, here, the plea professes to answer the whole, and fails by being an answer to the by-gone part of the account only.

BOSANQUET, J.—At the trial, though I thought it right to reserve the point, the inclination of my opinion was that a new assignment was not necessary. No authority has been cited that supports the defendants' view: and I am unable to distinguish *Freeman* v. *Crafts* from the present case.

COLTMAN, J.—I am also of opinion that a new assignment was not necessary in this case. The plea is just as general as the declaration: it professes to cover the whole sum the plaintiff seeks to recover. I think the case is not to be distinguished in principle from *Barnes* v. *Hunt*.

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ERSKINE, J.—I am of the same opinion. The declaration is general, claiming 100*l.* for work and labour, 100*l.* for money paid, and 100*l.* for money due upon an account stated; and the plea is, that, after the 100*l.* in the declaration mentioned became due, and after the accruing of the causes of action in respect thereof, the defendants paid to the plaintiff 100*l.* in full satisfaction and discharge of the same, which sum the plaintiff received in satisfaction. Now, it appears to me, that, unless the defendants shewed a payment and receipt of the sum mentioned in *satisfaction* of the entire demand, the plea was not proved. This is not like the case supposed, of two distinct causes of action. The evidence shewed that there was but one debt, that had been reduced by part payment to the amount claimed as the balance.

Rule discharged.

Thursday, May 23rd.

PAGET *v.* CHAMBERS.

One W. was admitted an attorney of the court of King's Bench in 1810, and took out his first certificate in 1813, which he regularly renewed till 1819, when he ceased to practise. In 1823, he was re-admitted in the King's Bench; but he did not take out a certificate until 1826, when he was for the first time admitted an attorney of the Common Pleas:—This Court refused to order his name to be struck off the roll, although the court of King's Bench had held that he was no attorney of that court at the time of his admission here—it not appearing that he had been guilty of any fraud or concealment on the occasion of his being admitted of this court, and the application against him being made after so great a lapse of time.

A GENTLEMAN named Henry Wilton was admitted an attorney of the court of King's Bench in the year 1810. In 1813, he took out his first certificate, and he continued to take out his certificate yearly until 1819. From the expiration of his last certificate, viz. the 15th November, 1820, he ceased to practise as an attorney. Being desirous of resuming his practice, he, in 1823, obtained his re-admission as an attorney of the court of King's Bench, upon an affidavit stating his original admission in that court, and that, in pursuance of the statute, and previous to his practising, he took out, and continued to take out and duly to pay for his annual certificate, until 1819. After his re-admission, Mr. Wilton took out no certificate until January,

1826. In Hilary Term, 1826, he was for the first time admitted an attorney of this court, upon an affidavit that he was then an attorney of the court of King's Bench, and upon producing to the officer his original admission in 1810 in the court of King's Bench, and an affidavit that he had paid the duty on his articles and been duly admitted in that court.

In Hilary Term, 1837, a rule was obtained in the court of King's Bench, in a cause of *Wilton* v. *Chambers*, 2 N. & P. 392, 7 Ad. & E. 524, calling upon Wilton to shew cause why a warrant of attorney given to him by the defendant should not be cancelled, and why certain judgments recovered by him against the defendant should not be vacated, and all writs of execution issued under them or any or either of them set aside, and why certain bills of exchange and other securities given by the defendant to Wilton should not be given up to be cancelled. The ground of the application was, that Wilton had, by omitting to take out his certificate for three years after his re-admission in 1823, become disabled from practising as an attorney (135). In Michaelmas Term following, the court made

(135) 37 Geo. 3, c. 90, s. 31, which enacts, "that every person admitted, sworn, inrolled, or registered in any of the said courts as aforesaid [i. e. a solicitor, attorney, notary, proctor, agent, or procurator, in any of his majesty's courts at Westminster, or in any Ecclesiastical court, or in any of the courts of Admiralty or Cinque Ports, the Great Sessions in Wales, or in any courts in the counties palatine, or in any other court in that part of Great Britain called England holding pleas where the debt or damages shall amount to 40*s.* or more] who shall neglect to obtain his certificate thereof in the manner before directed [ss. 26, 28], *for the space of one whole year*, shall from thenceforth be incapable of practising in his own name, or in the name of any other person, in any of the said courts, by virtue of such admission, entry, inrolment, or register; and the admission, entry, inrolment, or register of such person in any of the said courts shall be from thenceforth *null and void:* Provided always that nothing thereinbefore contained shall be construed to prevent any of the said courts from re-admitting any such person, on payment to the said commissioners of the duty accrued since the expiration of the last cer-

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the rule absolute, holding that an attorney, on re-admission, is bound to take out his certificate forthwith, and that "Mr. Wilton in 1826 was incapable of practising, and thus his re-admission was null and void by reason of the statute 37 Geo. 3, c. 90, or, in other words, that he was off the roll of attornies."

Wilde, Serjeant, upon an affidavit of the above facts, in Easter Term last, obtained a rule calling upon Mr. Wilton to shew cause why his name should not be struck off the roll of attornies of this court, on the ground that his admission here was obtained upon an unfounded statement of his being at the time an attorney of the court of King's Bench.

Erle and *Shee*, on a subsequent day in the same term, shewed cause, upon an affidavit of Wilton, stating, in substance, that, in Hilary Term, 1826, he applied at the Secondaries' office to ascertain what was requisite and necessary in order to be admitted an attorney of this court; that he stated to the Secondary the exact facts of his case as to his admission and re-admission in the court of King's Bench, and that he had taken out his first certificate under such re-admission in January, 1826; that he particularly inquired of the Secondary whether it was necessary for him to give the usual notices, as he had done on his re-admission in 1823, but was by him informed that it was not necessary to do so; and that the Secondary saw and approved of the affidavit upon that occasion before it was sworn.—Upon his admission in this court in 1826, Mr. Wilton in all respects duly complied with the practice of the court: his application was bonâ fide, and made without any fraud or concealment. Although, after the decision of the court of King's Bench in *Wilton* v. *Chambers*, 7 Ad. & E. 524, 2 N.

tificate obtained by such person, and such further sum of money by way of penalty as the said court shall think fit to order and direct."

& P. 392, it must be taken that his omission to obtain a certificate within a year after his re-admission in 1823, disabled him from afterwards practising as an attorney (though, it must be observed, that case turned rather upon a supposed usage than upon the words of the statute or upon any antecedent judicial decision); still he did not therefore to all intents and purposes cease to be on the roll of attornies; for, if that were so, he could not be re-admitted without going through all the ceremonies that are enjoined preliminary to an original admission; whereas it is every day's practice to re-admit an attorney who has inadvertently, or from some cause short of absolute culpability, omitted to renew his annual certificates, upon payment of a nominal fine. Thus, in *Hodkinson* v. *Mayer*, 6 Ad. & E. 194, 1 N. & P. 397, it was held that an attorney who practises in the county court, *after having omitted for a year to take out his certificate*, is not liable to penalties under the 12 Geo. 2, c. 13, s. 7, as a person practising in the county court without having been legally admitted according to the 2 Geo. 2, c. 23. So, in the Matter of *Hodgson* & *Ross*, 3 Ad. & E. 224, 4 N. & M. 763, it was held that an attorney who, after being examined, sworn, and admitted, neglects for a year to take out his certificate, is not an unqualified person within the statute 22 Geo. 2, c. 46, s. 11; and, if he practise, without being re-admitted, in the name of another attorney, he is not therefore liable to imprisonment, nor the other attorney to be struck off the roll, under that statute; though the latter would be punishable under the general jurisdiction of the court. Lord Denman there says: "Any attorney who knowingly acts for a person not qualified incurs the penalty. The qualification includes examination, swearing, and admission. This gives rise to an argument founded on the statute 37 Geo. 3, c. 90, s. 31, which makes the admission null and void where the certificate has not been renewed. The strength of the argument in favour of the rule rests upon this; and

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certainly a fair doubt does arise upon the word 'admission.' Yet, looking at the intent of the statute 22 Geo. 2, c. 46, which was, to secure skill and knowledge on the part of the attorney employed, and recollecting that a punishment is imposed for practising without qualification, we must, I think, control the sense of the word 'admission.' The object of the statute 37 Geo. 3, c. 90, was, to secure the payment of the stamp duty; and, although the 31st section declares the admission null and void, yet we cannot import that enactment into the preceding statute, so as to make the party subject to the punishment imposed on practising without being admitted." And Patteson, J., said: "The provision of 37 Geo. 3, c. 90, under which the admission is avoided, subject to re-admission, is merely a statutory regulation in favour of the revenue." In *Ex parte Jones*, 2 Dowl. 451, and *Hilleary* v. *Hungate*, 3 Dowl. 56, it was held that no re-admission is necessary to entitle an attorney to practise, where he has neither taken out a certificate nor practised for more than a year after his admission. A party cannot be called to the bar until he has for a certain period ceased to be an attorney; and for this purpose a motion to strike him off the roll is necessary, notwithstanding he may for more than twelve months have discontinued to renew his certificate. And this being, according to *Ex parte Matson*, 2 D. & R. 238, a case where, if the party had applied to be re-admitted, he would have been re-admitted without payment of any fine or arrears of duty, there was no inducement to commit a fraud. Abbott, C. J., in that case, says: "The words of section 31, 'shall *neglect* to obtain his certificate,' must be taken in connexion with the proviso for re-admission on payment of the arrears of duty since the last certificate. The distinction is this: when the party has been *practising* in the interval, he must pay the arrears of duty; but not so when he has not practised. The word *neglect* imports *culpability*.

Can we say that an attorney *neglects* to take out his certificate, who does not practise? Does not the term *neglect* import a forbearance to do that which by law a man ought to have done? The party, in cases of this description, stands nearly in the same situation as a person who in the first instance makes an application to be admitted. I think the word *neglect* imports an omission to do that which by law the party ought to have done; and that the case in which the arrears of duty are to be paid, and a fine to be imposed, is, only where the party, having been admitted, continues to practise, and neglects to take out his certificate between the interval of his first certificate and the time when he applies to be re-admitted. If the party has not practised in the interval, he is not required to pay the duty." The original admission having thus been held available in the several instances adverted to, it will be no violation of any statute to hold that it has virtue enough in it to sustain the admission in this court. The regulations as to the admission and re-admission of attornies are not so inflexible that a strict compliance with them may not be dispensed with—*Ex parte Hubbard*, 1 Dowl. 438; *Ex parte Blunt*, 5 Dowl. 231 (136). [*Tindal*, C. J.—These are only instances of an exercise of discretion by the court in dealing with their own rules, not with an act of parliament.] At all events, the great lapse of time since the admission took place (thirteen years), will weigh materially upon the minds of the court; and they will be slow to hold that a party who has exhibited no *culpable* negligence has subjected himself for so long a period to penalties—*Slack*, q. t., v. *Wilkins*, 1 C. & M. 23, 3 Tyr. 158. In an *Anonymous* case, 2 B. & Ad. 766, the court of King's Bench refused to strike an attorney off the roll on the ground of misconduct and the want of regular service, where he had been three years and a half admitted.

(136) And see Ex parte Edward Smith, ante, p. 344.

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Wilde, Serjeant, in support of his rule.—The application to the court of Queen's Bench in *Wilton* v. *Chambers* was, not to strike Wilton off the roll, but it assumed (and the court so held) that *he was not an attorney at all.* The motion here, to remove his name from the roll of this court, where it ought never to have been placed, is not inconsistent with that case. The statute, it is true, is to a certain extent a revenue act, but it also contains provisions that are directed to objects of a very different nature, and objects of the gravest importance to the interests of the public. The court are not now called upon to deal with a mere accidental omission to take out a certificate; but with a deliberate and voluntary ceasing to practise for a series of years. This court, so early as the year 1815, settled the course to be followed in such cases; holding that the admission of an attorney who has omitted to take out his certificate for one whole year after his admission, is absolutely void, and he must be re-admitted before he can practise—*Ex parte Nicholas*, 6 Taunt. 408. Wilton's re-admission in 1823 became a nullity in consequence of his omission to take out his certificate within a year. In 1826, he came to this court, and, upon a false statement that he was then an attorney of the court of King's Bench, procured himself to be admitted an attorney here—thus avoiding that which would have been required of him had he applied to be re-admitted in the King's Bench, viz. to account for what he had been doing since 1823, so as to entitle himself to be permitted to resume his practice without a fine. Whatever hardship it may entail on the party, the court must, with a view to the propriety and regularity of its own proceedings, as well as the protection due to the public, so decide as to deprive Mr. Wilton of an advantage he has thus surreptitiously obtained.

Cur. adv. vult.

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TINDAL, C. J., now delivered the opinion of the court:—Upon this rule, which calls upon Mr. Henry Wilton to shew cause why his name should not be struck off the roll of attornies of this court, the facts upon which the court is called upon to determine are these:—Mr. Wilton was admitted an attorney of the court of King's Bench in 1810, and took out his first certificate as an attorney in 1813, continuing his certificate yearly till 1819 inclusive, when his last certificate was in force until the 15th November, 1820. From that time he ceased to take out his certificate or to practise till 1826.

In the year 1823, he was re-admitted an attorney of the court of King's Bench, upon an affidavit stating his original admission, and that, in pursuance of the statute, and previous to his practising, he took out a certificate, which he continued to take out and duly to pay for the same, until the 15th November, 1820, but from that day he omitted so to do, and ceased to practise. But, after such re-admission, no certificate was taken out by him until 1826.

Upon this state of facts, on the 25th June, 1837, a rule nisi was obtained in the court of King's Bench, in the case of *Wilton* v. *Chambers*, calling on the plaintiff to shew cause why certain judgments, executions, and other securities, should not be set aside; which rule was afterwards made absolute in Michaelmas Term, 1837, the rule reciting that Wilton was not entitled to practise in the court of King's Bench, and that the question as to the judgments, &c., should be referred to the Master, on certain terms therein contained. The judgment of the court of King's Bench is reported in 7 Ad. & E. 532, and 2 Nev. & P. 398; from which it appears that the ground on which the court proceeded to make the rule absolute was, that, on re-admission, an attorney is bound to take out his certificate forthwith; and that, Mr. Wilton not having done so till 1826, his re-admission in 1823 was null and void under the 31st section

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of the 37 Geo. 3, c. 90; or, in other words, that, in 1826, he was off the roll of attornies of that court.

Such being the statement relating to Mr. Wilton as an attorney of the court of King's Bench, it appears, that, in Hilary Term, 1826, he was for the first time admitted an attorney of the court of Common Pleas, upon an affidavit that he was then an attorney of the court of King's Bench, and, upon producing to the officer the admission of 1810 in the court of King's Bench, and reading his affidavit that he had paid the duty on the articles, and that he had been admitted an attorney of the court of King's Bench.

Nothing can be more express or positive than the affidavit of Mr. Wilton, as to the exclusion of any possibility of fraud on his part in obtaining his admission in this court. In Hilary Term, 1826, he applied at the Secondaries' office to ascertain what was requisite and necessary in order to be admitted an attorney of this court: he stated to the Secondary the exact facts of his case as to his admission and re-admission in the King's Bench, and that he had taken out his first certificate under such re-admission in January, 1826; and asked the officer especially if it was necessary for him to give the usual notices, as he had done on his re-admission; when the Secondary told him he need not do so, but that all that was necessary was to make such affidavit as in fact he had made; and, even before he swore the affidavit, he shewed it to the Secondary, who stated that it was sufficient. And the officer has certified to the court, during the progress of the argument, that the affidavit was in the precise form then used, and upon which very large numbers of attornies have been admitted in this court; although, since that time, the form has been altered, by the insertion of an allegation that the party has *continued* an attorney of the King's Bench ever since his admission or re-admission.

Upon this affidavit Mr. Wilton was admitted, and, from

the year 1826, he took out his certificate regularly to 1831, when he ceased to practise altogether.

Now, it may be questionable whether Mr. Wilton was regularly admitted, or, more properly, whether he was entitled to claim to be admitted in the Common Pleas upon filing the affidavit which he produced; for, if the defect in it had been pointed out at the time, the court would probably have required an original admission in this court. But he was admitted de facto, without any fraud, and with the knowledge of the Secondary, whom, as before stated, he consulted on the steps to be taken. He had never practised in the Common Pleas before that admission: he had never been guilty of any neglect in taking out his certificate after his original admission in that court. The objection, therefore, which was made, and held to be available against the validity of his re-admission in the court of King's Bench, viz. that he had not forthwith taken out his certificate, and therefore, under the 37 Geo. 3, c. 90, s. 31, his admission was null and void, cannot apply to his admission in the Common Pleas in 1826; for, the certificate was forthwith taken out after such admission, and regularly continued. If Mr. Wilton, instead of resting upon his admission in the court of King's Bench, had given the regular notices, and obtained his admission as an original admission as an attorney of this court, all would have been, not only valid in law, but strictly regular and free from objection.

The question, therefore, becomes this—whether this court is bound to strike Mr. Wilton's name off the roll, on the ground, not that his admission is absolutely void, but that, as the facts now appear, it may have been irregularly obtained. And we think, under the circumstances above referred to, and particularly observing the great distance of time at which the objection is made, that we are not called upon, in the exercise of a sound discretion, to direct his name to be struck off.

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The rule, therefore, must be discharged; but, as it appears to us, that, if the court had known at the time of his admission in 1826, that his re-admission in the court of King's Bench was invalid on the ground of the omission to take out his certificate, they would not have allowed him to be admitted in this court on such affidavit, we think it should be discharged without costs.

Rule discharged, without costs.

Thursday, May 23rd.

TOPLIS and Another *v.* GRANE.

The defendant, an attorney, employed the plaintiffs to levy a distress for rent upon the premises of an auctioneer, urging them to make the levy *forthwith*, assigning as a reason that *there was a large quantity of furniture in the auction-room*, and by the warrant he directed them to distrain "the *several* goods and chattels on the premises." Acting upon these instructions, the plaintiffs caused all the goods upon the premises to be seized. Some of the goods so seized turning out to be protected from distress, the owners brought actions, and eventually the goods were restored to them, and the plaintiffs incurred costs:—Held, that, under the circumstances, an indemnification of the plaintiffs against the consequences of pursuing the defendant's instructions, was implied by law.

Held, also, that the plaintiffs' conduct in the premises did not exhibit such a degree of negligence and want of skill as to afford an answer to an action for their work and labour.

The warrant was originally addressed to the plaintiffs or their agent. The plaintiffs' clerk struck out the plaintiffs' name and inserted that of one W. The distress having been made by W., the defendant had notice of that fact, and had several communications with W. as to the disposing of the goods:—Held, that the employment of W. was sufficiently authorized by the defendant, and that the alteration did not render the warrant void.

Quære, whether a broker who enters under an ordinary warrant of distress, and takes goods upon the premises that are privileged by law from distress, can look for indemnity from his employer?—Semble not.

THIS was an action of assumpsit upon a promise of indemnity.

The first count of the declaration stated, that the defendant, at the time of the making of his promise and undertaking thereinafter next mentioned, used, exercised, and carried on the profession or business of an attorney and solicitor; that the defendant, just before the time of the making of his said promise and undertaking, had represented and affirmed to the plaintiffs that he the defendant was the attorney of one Frances Osborne, and that she the said Frances Osborne was then lawfully entitled to certain arrears of rent amounting to a certain sum of

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money, to wit, 210*l.* 15*s.* 6*d.*, due to her at Christmas, 1831, from one William Armstrong, in respect of the rent of certain premises being No. 5 New Bridge Street, in the parish of St. Bride's, London, and that the said Frances Osborne was then entitled to distrain on the said premises for the recovery thereof; and thereupon, on the 14th January, 1832, in consideration thereof, and that the plaintiffs, at the special instance and request of the defendant, would by themselves or their agents seize and distrain certain goods and chattels on the premises at No. 5 New Bridge Street aforesaid, for the recovery of the said arrears of rent so alleged to be due to the said Frances Osborne as aforesaid, he the defendant undertook and then faithfully promised the plaintiffs to indemnify and save harmless the plaintiffs from all loss, damage, costs, and charges which should or might arise or happen to or be incurred by them for or by reason of such seizure and distress of the said goods and chattels, or any of them: that the plaintiffs, confiding in the said promise and undertaking of the defendant, did then employ certain persons then carrying on the business of brokers in copartnership, to wit, one Thomas Warlters, one William Warlters, and one Samuel Lovejoy, to make such seizure and distress of the several goods and chattels as aforesaid, as agents of the plaintiffs in that behalf; and the defendant then assented to the employment of such last-mentioned persons by the plaintiffs as aforesaid: that the said agents of the plaintiffs in that behalf did then, on the 16th January, in the year last aforesaid, as such agents, seize and distrain the said several goods and chattels then being on the said premises at No. 5 New Bridge Street aforesaid, for the recovery of the said arrears of rent so alleged by the defendant to be due to the said Frances Osborne as aforesaid: that, after the said seizure and distress, to wit, on the day and year last aforesaid, divers large quantities of the said goods and chattels so distrained as aforesaid were

Plaintiffs employed by defendant to distrain for rent.

Implied indemnity.

Delegation of authority to W.

Defendant's assent thereto.

W. seized.

Certain of the goods claimed by the owners as privileged from distress,

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claimed by divers persons, on the ground that the same goods and chattels respectively were privileged from the said seizure and distress so made on behalf of the said Frances Osborne as aforesaid; of which said claims the defendant had notice, and was then requested by the plaintiffs to permit them to return the same goods and chattels to the said respective claimants, but he the defendant then wholly refused to give such permission, and then directed the plaintiffs to retain the said goods and chattels, and cause the same to be retained as such distress as aforesaid: that the said several persons who had so claimed the said several goods and chattels on the ground of their being so privileged from distress and seizure as aforesaid, and who were then at the time of the said distress in fact entitled to the possession of the same goods and chattels respectively, thereupon impleaded the said T. Warlters, and W. Warlters, together with other persons, in divers, to wit, ten different actions at law, for the recovery of damages in respect of the seizure and detention of the several goods and chattels aforesaid, to which they were so respectively entitled as aforesaid, which said respective actions he the defendant did defend or cause to be defended; and such proceedings were thereupon had in the said several actions, that they the said T. Warlters and W. Warlters were afterwards forced and obliged to pay, and did, out of the joint funds of themselves and the said S. Lovejoy, as such co-partners as aforesaid, pay unto the said several persons being plaintiffs in the said respective actions, divers sums of money amounting in the whole to a large sum of money, to wit, 140*l.*, for damages in respect of such seizure and distress of and upon their said respective goods and chattels, and in order to compromise the claims and demands of the several persons in respect thereof, and for certain costs of suit of the respective plaintiffs in the said respective actions; and the said T. Warlters and W. Warlters were

of which defendant had notice, but refused to allow them to be restored.

Claimants brought actions against W. and others, which were defended by the defendant.

W. compelled to pay damages, &c.,

and incurred costs,

also forced and obliged to pay, and did, out of the joint funds of themselves and the said S. Lovejoy, as such co-partners as aforesaid, pay divers other sums of money, amounting in the whole to another large sum of money, to wit, 150*l.*, for costs necessarily incurred by them in respect of the premises respectively, and in and about the keeping and detaining of the said goods and chattels to await the result of the said actions; and the said T. Warlters, W. Warlters, and S. Lovejoy then demanded payment from the plaintiffs of the said several last-mentioned sums of money: and, although the said respective goods and chattels so claimed as being privileged from the distress and seizure aforesaid, were, at the time of such distress and seizure, in fact so privileged; whereof the defendant had due notice; and although, afterwards, on the 25th January, 1835, they, the plaintiffs, gave notice to the defendant of the demand of payment so made upon them by the said T. Warlters, W. Warlters, and S. Lovejoy as aforesaid, and then requested the defendant to indemnify and save harmless the plaintiffs from and against the same payment, and all damages in respect of the premises: nevertheless the defendant, not regarding his said promise and undertaking, but contriving and intending to deceive and defraud the plaintiffs in this respect, did not nor would, when he was so requested, or at any other time, indemnify and save harmless the plaintiffs from such payment to the said T. Warlters, W. Warlters, and S. Lovejoy of the said last-mentioned sums of money, or any part thereof, or of all damages in respect thereof; but wholly neglected and refused so to do; by means whereof they the said T. Warlters, W. Warlters, and S. Lovejoy, for recovering damages on occasion of the premises, afterwards impleaded the plaintiffs in a certain action in his majesty's court of Exchequer; and such proceedings were thereupon had in the said last-mentioned court, that the said T. Warlters, W. Warlters, and S. Lovejoy afterwards, by

which the plaintiffs were called on to pay.

First breach—defendant refused to indemnify plaintiffs.

W. sued plaintiffs,

and obtained judgment.

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the consideration and judgment of the said last-mentioned court, recovered against the plaintiffs a large sum of money on occasion of the premises, and of their costs by them about their suit in that behalf expended, to wit, 164*l.* 9*s.*, which last-mentioned sum of money they, the plaintiffs, afterwards, to wit, on the 25th May, 1835, were forced and obliged to pay, and did then pay to the said T. Warlters, W. Walters, and S. Lovejoy; and the plaintiffs were also forced and obliged to lay out and expend, and did lay out and expend, a large sum of money, to wit, 50*l.*, in and about their defence in the said last-mentioned action; from which several sums of money so paid by the plaintiffs as aforesaid, he the defendant had not idemnified or saved harmless the plaintiffs, although often requested so to do, but had therein wholly failed and made default, contrary to the form and effect of the said promise and under-

Second breach.

taking of the defendant so by him made as aforesaid: and, although the plaintiffs had been put to and had incurred divers other costs and charges, amounting to a large sum, to wit, the sum of 100*l.*, on occasion of the premises, and although afterwards, on the 4th June, 1835, they the plaintiffs required the defendant to indemnify them from the said costs, charges, and expenses; yet the defendant, not regarding his said promise, had not indemnified the plaintiffs as last aforesaid, nor paid to them the said monies, or any of them, as aforesaid, &c.

Common counts.

The declaration also contained indebitatus counts (each claiming 200*l.*) for work and labour and materials, for money paid, and for money found due from the defendant to the plaintiffs on an account stated.

First plea.

Pleas—first, non assumpsit, upon which issue was joined.

Second plea.

Second—As to so much of the causes of action in the first count mentioned as related to the employment of the said T. Warlters, W. Warlters, and S. Lovejoy by the plaintiffs as in that count mentioned—*that the defendant did not*

assent to the employment by the plaintiffs of the said T. Warlters, W. Warlters, and S. Lovejoy to make such seizure and distress, modo et formâ; whereupon issue was joined.

Third plea. Third—as to so much of the causes of action in the said first count mentioned as related to the defendant having directed the plaintiffs to retain the said goods and chattels, and cause the same to be retained, as in that count mentioned—*that the defendant did not direct the plaintiffs to retain the said goods and chattels, and cause the same to be retained,* modo et formâ; whereupon issue was joined.

Fourth plea. Fourth—as to the causes of action in the introductory part of the third plea mentioned—that true it was that he the defendant did direct the plaintiffs to retain the said goods and chattels in the said first count mentioned, and to cause the same to be retained as such distress as in that count mentioned, but that afterwards, and within a reasonable time after such direction given by the defendant, and *before the sale of the said goods,* and before any expenses were incurred in respect of the same, to wit, on the 28th January, 1832, he *the defendant* wholly *recalled and revoked the said direction,* and then expressly left it to the plaintiffs to exercise their own discretion to sell the said goods and chattels so seized as aforesaid, or not.

Replication thereto. Replication—*that the defendant did not* within a reasonable time after such direction given by the defendant, and before the sale of the said goods, and before any expenses were incurred in respect of the same, wholly *recall and revoke the said direction,* and leave it to the plaintiffs to exercise their own discretion to sell the said goods and chattels or not, modo et formâ: issue thereon.

Fifth plea. Fifth—as to so much of the causes of action in the said first count mentioned as related to the defendant having defended or caused to be defended the said actions in the said first count said to have been brought by the several persons who claimed the said goods and chattels against the said T. Warlters and W. Warlters, together with other

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persons—*that the said actions* in the first count mentioned to have been brought by the several persons who had claimed the said goods and chattels against the said T. Warlters and W. Warlters, together with other persons, were brought against the said T. Warlters and W. Warlters, the now defendant, the said Frances Osborne, one Jonathan Osborne, and one W. Malyon, the said four last-mentioned persons being the said other persons in the said first count mentioned, and the said Jonathan Osborne and W. Malyon having been employed by and on the behalf of the plaintiffs in the making of the said distress; that, at the time of the bringing of the said actions, he the defendant was an attorney of the court of Exchequer, and a partner with J. S. Brooks and T. Cooper, attornies at law, and carrying on business in co-partnership with them as such attornies under the style and firm of Brooks, Grane, & Cooper; and that the said actions *were defended* and caused to be defended *by the now defendant* and the said J. S. Brooks and T. Cooper for and on account of the said Frances Osborne, as the attornies of and for the said Frances Osborne, and on her retainer, and for and on account of the now defendant, and for his necessary protection in that behalf, he the defendant so being a partner in the said firm of Brooks, Grane, & Cooper as aforesaid, and for and on account of the said T. Warlters and W. Warlters, Jonathan Osborne, and W. Malyon, *as the attornies of and for the now plaintiffs, and upon their retainer* by them in that behalf given to the defendant and the said J. S. Brooks and T. Cooper; and that he the defendant did defend and caused to be defended the said last-mentioned actions in manner and form as in that plea mentioned, but not further or otherwise.

Replication thereto.

Replication—*That the said actions were not defended* or caused to be defended *by the defendant* and the said J. S. Brooks and T. Cooper for and on account of the said Frances Osborne as the attornies of and for the said Frances Os-

borne and on her retainer, and for and on account of the defendant and for his necessary protection in that behalf, and for and on account of the said T. Warlters and W. Warlters, Jonathan Osborne, and W. Malyon, *as the attornies of and for the plaintiffs and upon their retainer,* modo et formâ: issue thereon.

Sixth plea. Sixth—as to the breach in the said first count assigned—that the said T. Warlters and W. Warlters were not forced and obliged to pay, and did not pay, unto the said several persons being plaintiffs in the said respective actions in the said first count mentioned, any sums of money whatsoever for damages in respect of such seizure and distress as in the said first count was mentioned, or in order to compromise the claims and demands of the said several persons in respect thereof, or for costs of suit of the respective plaintiffs in the said respective actions, nor were the said T. Warlters and W. Warlters forced or obliged to pay, nor did they pay any monies for costs necessarily incurred by them in respect of the said actions, or in or about the keeping and retaining of the said goods and chattels; nor were the plaintiffs forced or obliged to, nor did they lay out or expend any monies whatsoever in or about their defence in the action brought against them by the said T. Warlters, W. Warlters, and S. Lovejoy, modo et formâ: issue thereon.

Seventh plea. Seventh—As to the breach in the said first count lastly assigned—that the plaintiffs were not put to, nor did they incur any costs and charges, modo et formâ: issue thereon.

Eighth plea. Eighth—As to the first count—*that the plaintiffs were damnified* as in that count mentioned *by and through the negligence, misconduct, and default of the plaintiffs and their servants, and by and through the want of skill, care, and attention of the plaintiffs and of their servants,* and not further or otherwise.

Replication thereto. Replication—that the plaintiffs were *not* damnified as in the said first count mentioned by and through the negligence, misconduct, or default of the plaintiffs or their

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dant for the purpose of distraining for certain arrears of rent in and upon certain premises, and that the materials therein also mentioned were provided by the plaintiffs in and about the same; and that the money in the third count mentioned was paid and disbursed by the plaintiffs in and about the said retainer and for the purpose aforesaid; and *that the said work was done and performed by the plaintiffs so unnecessarily, and in so negligent, unskilful, and improper a manner, that, by and through the default, negligence, and want of skill, care, and attention of the plaintiffs in that behalf, the said work* in that count mentioned, and the materials for the same provided, and the said disbursements so made as aforesaid, *became* and were *wholly useless and of no value whatsoever to the defendant;* whereof the plaintiffs at the time in the said second and third counts mentioned had notice.

Replication thereto.

Replication—That the work in the said second count mentioned was *not* done and performed by the plaintiffs unnecessarily or in so negligent, unskilful, or improper a manner, that, by and through the default, negligence, and want of skill, care, or attention of the plaintiffs in that behalf, the said work, and the materials for the same provided, and the said disbursements so made in respect of the same, became and were wholly useless and of no value whatever to the defendant, modo et formâ: issue thereon.

Case.

The action was brought to recover the sum of 185*l.* 9*s.* 6*d.*, under the following circumstances:—

Plaintiffs auctioneers, &c.

The plaintiffs were partners as auctioneers and valuers, under the firm of Toplis & Son.

Defendant an attorney.

The defendant is an attorney, and, from a period anterior to Christmas, 1831, until the 24th June, 1832, carried on business as such in partnership with Messrs. Brooks and Cooper, under the firm of Brooks, Grane, & Cooper. Since the last-mentioned day, he has carried on business alone.

Rent due to Mrs. Osborne.

At Christmas, 1831, 210*l.* 15*s.* 6*d.* became due from Mr. W. Armstrong to Mrs. Frances Osborne, the aunt of the

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notices (directed to them, and to the defendant, and to Frances Osborne) of claims to some of the goods by ten different persons, as being their property: whereupon Messrs. Warlters & Co. handed over the notices to the plaintiffs, who immediately sent them to the defendant.

On the same day, the plaintiffs sent Brown, their clerk, to the defendant, to request that he would give them further directions, and an express indemnity, before they proceeded further with the distress. The defendant thereupon wrote to the plaintiffs the following:—

"20th January, 1832.

Indemnity.

"We hereby undertake, on the part of Mrs. Osborne, to indemnify you for proceeding to sell the goods distrained on the premises No. 5 New Bridge Street.

"Brook, Grane, & Cooper."

The plaintiffs forwarded the above to Messrs. Warlters, adding thereto—"We hereby undertake to indemnify you in the above matter."

Removal of the goods.

On the 21st January, the goods distrained were condemned, and some of them were removed from Armstrong's premises to Messrs. Warlters' ware-rooms in Farringdon Street, preparatory to a sale: of which removal the defendant had notice.

Communications between the plaintiffs, defendant, and Warlters.

On the 23rd, a clerk of Messrs. Warlters called on the defendant, and stated that the attorney of the claimants had called upon them, and said he had a note from the defendant to give up the goods; when the *defendant said that Messrs. Warlters were to go on with his instructions till the same were contradicted.* On the 24th, the defendant called upon the plaintiffs, and told them they were to go on with the distress, and that he would give them a further guarantie. On the 25th, the defendant called upon Messrs. Warlters, and said he would write to them that evening or the following morning, and that the goods were not to be removed till then. The goods so removed were advertised for sale on the 27th January.

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Letter from defendant to plaintiffs, 28th January.

On the 28th January, the defendant wrote the plaintiffs the following letter:—

"Influenced very much by your stating to me on Thursday last, that 100*l.* would be willingly subscribed by yourself and friends to defend the actions brought by Mr. Mott and his employer, I have not settled those actions, as I had before proposed to do: and the plaintiffs' attorney now refuses to settle them. I regret I have not seen or heard from you on the subject since Thursday. As the goods are not yet sold, *I must request you to consider my letter to you of the 26th instant, containing an undertaking* on the part of Mrs. Osborne *to indemnify you for selling* them, *as revoked.* I must leave you to exercise your own discretion as to selling them or not: but, if you wish for any other indemnity or guarantie, I will with pleasure apply to Mrs. Osborne for her sanction.

Revocation of defendant's undertaking.

signed) "W. Grane,
"for Brooks, Self, & Co."

On the 31st, the defendant again wrote to the plaintiffs, as follows:—

Letter of 31st January.

"Counsel advised that I should appear for Mrs. Osborne and myself alone, as I have not received from Mr. Warlters the authority to appear for himself and the three others. This, therefore, I have directed to be done; and they must take any consequences resulting from their not giving me the necessary authority to appear for them. Counsel also thinks that it is more hazardous not to sell than to sell, because the surplus (if any) should be ascertained and returned as speedily as possible, in the usual way; and, if not, he thinks they may have a fresh ground of action. At the same time, *I must leave it to yourself and Mr. Warlters to act as you may think proper in this respect;* as counsel is of opinion that Mrs. Osborne ought not to give any indemnity for the discharge of duties as to which not the least doubt was raised till after the goods had been taken."

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Ultimately, *at the request of the present plaintiffs*, Messrs. Brooks, Grane, & Cooper entered appearances for all the defendants in the several actions. The sale was again advertised to take place on the 7th February. On the 6th, Messrs. Warlters offered to pay the costs and settle the actions, provided the defendant would consent to the goods being returned; and the defendant was again applied to for an indemnity. On the following day, he addressed a letter (in the name of his firm) to the plaintiffs, declining to give any indemnity, and concluding thus:—

Letter of 7th February.

"In the meantime, we must leave it to your own discretion to proceed with the sale of the goods seized, or not: but, as Mrs. Osborne's solicitors, *we wish the sale to take place when by law it ought.*

On the 29th February, the defendant wrote to the plaintiffs as follows:—

Letter of 29th February.

"Counsel has again advised us that the goods ought to be sold, or the defendants may be prejudiced at the trial. You will, of course, exercise your own descretion in this respect: but Mrs. Osborne must not be prejudiced: she looks to you for compensation for any injury she may sustain by reason of the goods not being sold in due time."

Again, on the 17th April:—

Letter of 17th April.

"We presume that these goods have been sold, pursuant to our directions and to the advice of counsel. If not, we beg to know why they have not, and in whose possession they now are; in order that we may immediately consult with counsel as to the proper course to be taken by Mrs. Osborne."

The case then set forth a long correspondence between the parties, and a variety of unimportant facts. From these it appeared, that, ultimately, one of the actions before alluded to was tried, and a verdict entered for the

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plaintiff (137); and that thereupon the other nine were settled, the costs being paid, and the goods restored. The costs, which amounted to 222*l.* 15*s.* 10*d.*, were paid by the defendant.

Sums paid by plaintiffs.

Messrs. Walters afterwards sued the plaintiffs for the expenses incident to the distress, and the costs consequent thereon, and recovered against them 164*l.* 9*s.*, which, with 21*l.* 0*s.* 6*d.*, the costs of defending that action, amounted to 185*l.* 9*s.* 6*d.*, the sum sought to be recovered in this action.

Question.

The Court was to be at liberty to draw any inferences of fact which a jury under the circumstances might have drawn; and the parties agreed to be concluded by the finding of the Court upon the whole matter: and the question for the opinion of the Court was, whether, under the circumstances, the defendant was liable or not; and, if he was, to what amount: the verdict and judgment to be entered accordingly.

The case was argued at the sittings in banc after the last Hilary Term.

As to the implied identity.

Wightman, for the plaintiffs.—The defendant, by his authority of the 14th January, 1832, and subsequent conduct, was bound to indemnify the plaintiffs from all consequences arising from the making of the distress. The party distrained upon being an auctioneer, and consequently the goods deposited with him for sale being privileged from distress for rent, the moment the defendant received notice of the fact, he should have consented to their being restored to their respective owners. This he to the last refused to do. He directed, not only that *all the goods* on the premises should be seized, but insisted

(137) See *Adams* v. *Grane*, 1 Cr. & M. 380, 3 Tyr. 326—the Court holding that goods deposited on the premises of an auctioneer for the purpose of sale, are privileged from being distrained for rent.

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ient to the employment by the plaintiffs of the said T. Warl-
rs, W. Warlters, and S. Lovejoy to make such seizure and
stress, modo et formâ; whereupon issue was joined.

Third plea.

Third—as to so much of the causes of action in the said
st count mentioned as related to the defendant having
rected the plaintiffs to retain the said goods and chattels,
id cause the same to be retained, as in that count men-
oned—*that the defendant did not direct the plaintiffs to re-*
in the said goods and chattels, and cause the same to be re-
ined, modo et formâ; whereupon issue was joined.

Fourth plea.

Fourth—as to the causes of action in the introductory
art of the third plea mentioned—that true it was that he
he defendant did direct the plaintiffs to retain the said
goods and chattels in the said first count mentioned, and
to cause the same to be retained as such distress as in that
count mentioned, but that afterwards, and within a reason-
able time after such direction given by the defendant, and
before the sale of the said goods, and before any expenses
were incurred in respect of the same, to wit, on the 28th
January, 1832, he *the defendant* wholly *recalled and revoked*
he said direction, and then expressly left it to the plaintiffs
o exercise their own discretion to sell the said goods and
hattels so seized as aforesaid, or not.

Replication thereto.

Replication—*that the defendant did not* within a reason-
ble time after such direction given by the defendant, and
fore the sale of the said goods, and before any expenses
re incurred in respect of the same, wholly *recall and re-*
ke the said direction, and leave it to the plaintiffs to exer-
se their own discretion to sell the said goods and chattels
not, modo et formâ: issue thereon.

Fifth plea.

Fifth—as to so much of the causes of action in the said
st count mentioned as related to the defendant having
fended or caused to be defended the said actions in the
id first count said to have been brought by the several
rsons who claimed the said goods and chattels against
e said T. Warlters and W. Warlters, together with other

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persons—*that the said actions* in the first count mentioned to have been brought by the several persons who had claimed the said goods and chattels against the said T. Warlters and W. Warlters, together with other persons, were brought against the said T. Warlters and W. Warlters, the now defendant, the said Frances Osborne, one Jonathan Osborne, and one W. Malyon, the said four last-mentioned persons being the said other persons in the said first count mentioned, and the said Jonathan Osborne and W. Malyon having been employed by and on the behalf of the plaintiffs in the making of the said distress; that, at the time of the bringing of the said actions, he the defendant was an attorney of the court of Exchequer, and a partner with J. S. Brooks and T. Cooper, attornies at law, and carrying on business in co-partnership with them as such attornies under the style and firm of Brooks, Grane, & Cooper; and that the said actions *were defended* and caused to be defended *by the now defendant* and the said J. S. Brooks and T. Cooper for and on account of the said Frances Osborne, as the attornies of and for the said Frances Osborne, and on her retainer, and for and on account of the now defendant, and for his necessary protection in that behalf, he the defendant so being a partner in the said firm of Brooks, Grane, & Cooper as aforesaid, and for and on account of the said T. Warlters and W. Warlters, Jonathan Osborne,

and on her retainer, and for and on account of the dant and for his necessary protection in that behalf, for and on account of the said T. Warlters and 'arlters, Jonathan Osborne, and W. Malyon, *as the ies of and for the plaintiffs and upon their retainer,* et formâ: issue thereon.

th—as to the breach in the said first count assigned— Sixth plea.
he said T. Warlters and W. Warlters were not forced bliged to pay, and did not pay, unto the said several ns being plaintiffs in the said respective actions in the irst count mentioned, any sums of money whatsoever mages in respect of such seizure and distress as in the irst count was mentioned, or in order to compromise aims and demands of the said several persons in re- thereof, or for costs of suit of the respective plaintiffs said respective actions, nor were the said T. Warlters W. Warlters forced or obliged to pay, nor did they pay nonies for costs necessarily incurred by them in re- of the said actions, or in or about the keeping and re- g of the said goods and chattels; nor were the plain- orced or obliged to, nor did they lay out or expend nonies whatsoever in or about their defence in the n brought against them by the said T. Warlters, 'arlters, and S. Lovejoy, modo et formâ: issue thereon.

venth—As to the breach in the said first count lastly Seventh plea.
ned—that the plaintiffs were not put to, nor did they any costs and charges, modo et formâ: issue thereon.

ghth—As to the first count—*that the plaintiffs were* Eighth plea.
ified as in that count mentioned *by and through the gence, misconduct, and default af the plaintiffs and their nts, and by and through the want of skill, care, and tion of the plaintiffs and of their servants,* and not ier or otherwise.

plication—that the plaintiffs were *not* damnified as in Replication thereto.
said first count mentioned by and through the negli- e, misconduct, or default of the plaintiffs or their

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servants, or by or through the want of skill, care, or s
tion of the plaintiffs or their servants, modo et formâ:
thereon.

Ninth plea.

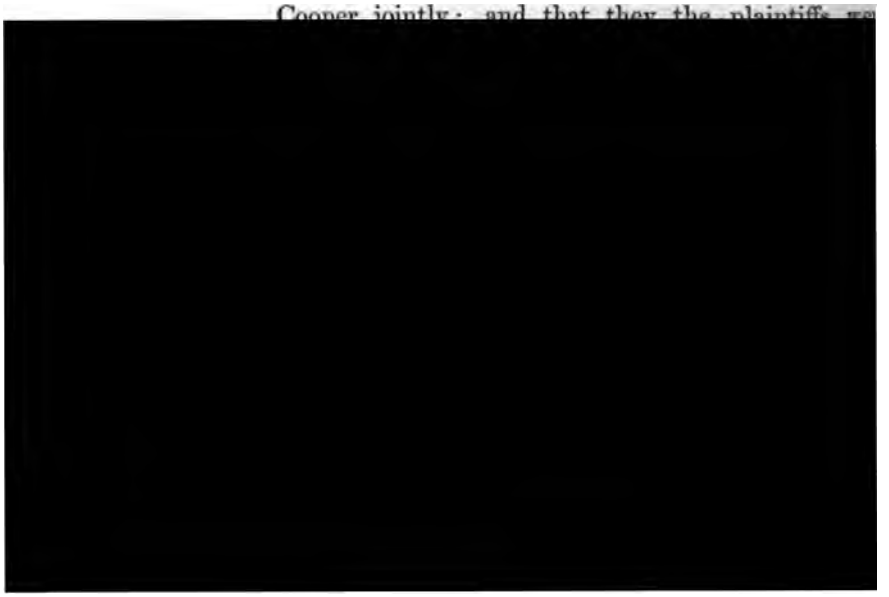
Ninth—As to the second and subsequent counts
the promises in those counts mentioned were made b
defendant and the said J. S. Brooks and T. Cooper jo

Set-off.

and not by the defendant alone; and that the pla
were indebted to the defendant and the said J. S. B
and T. Cooper for work done and materials provided l
defendant and the said J. S. Brooks and T. Cooper f
plaintiffs at their request, and for money paid by tl
fendant and the said J. S. Brooks and T. Cooper for tl
of the plaintiffs, at their request, and for money fou
be due from the plaintiffs to the defendant and th
J. S. Brooks and T. Cooper on an account stated be
them; out of which said sum of money so due to tl
fendant and the said J. S. Brooks and T. Cooper
defendant claimed to set off sufficient to satisfy the da
by the plaintiffs sustained by reason of the non-perfor
of the promises in the said second and subsequent c
mentioned.

Replication thereto.

Replication—That the promises in the second and
sequent counts mentioned were not nor was either of
made by the defendant and the said J. S. Brooks a
Cooper jointly; and that they the plaintiffs we



t for the purpose of distraining for certain arrears of ; in and upon certain premises, and that the materials ein also mentioned were provided by the plaintiffs in about the same; and that the money in the third at mentioned was paid and disbursed by the plaintiffs nd about the said retainer and for the purpose aforesaid; *that the said work was done and performed by the plain- so unnecessarily, and in so negligent, unskilful, and roper a manner, that, by and through the default, negli- e, and want of skill, care, and attention of the plaintiffs hat behalf, the said work* in that count mentioned, and materials for the same provided, and the said disburse- its so made as aforesaid, *became* and were *wholly useless of no value whatsoever to the defendant;* whereof the ntiffs at the time in the said second and third counts itioned had notice.

Replication thereto.

leplication—That the work in the said second count itioned was *not* done and performed by the plaintiffs ecessarily or in so negligent, unskilful, or improper a ner, that, by and through the default, negligence, and it of skill, care, or attention of the plaintiffs in that alf, the said work, and the materials for the same pro- d, and the said disbursements so made in respect of same, became and were wholly useless and of no value tever to the defendant, modo et formâ: issue thereon.

Case.

he action was brought to recover the sum of 185*l.* 9*s.* 6*d.*, er the following circumstances:—The plaintiffs were

Plaintiffs auctioneers, &c.

ners as auctioneers and valuers, under the firm of lis & Son. The defendant is an attorney, and, from a iod anterior to Christmas, 1831, until the 24th June, 2, carried on business as such in partnership with srs. Brooks and Cooper, under the firm of Brooks, ne, & Cooper. Since the last-mentioned day, he has ried on business alone.

Defendant an attorney.

At Christmas, 1831, 210*l.* 15*s.* 6*d.* became due from Mr. Armstrong to Mrs. Frances Osborne, the aunt of the

Rent due to Mrs. Osborne.

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Tenant an auctioneer.

defendant, for rent of the premises No. 5 New B Street, Blackfriars. Armstrong was an auctioneer the lower part of the premises was used by him fi purpose of an auction-room. On the afternoon of day, the 14th January, 1832, the defendant called plaintiffs' office, and gave to one Brown, their cle following authority to distrain for the above men rent:—

Warrant or authority to distrain.

"Messrs. Toplis, or their agent,—I do hereby au you, *or your agent*, to seize and distrain the *severa* and chattels on the premises No. 5, New Bridge St the parish of St. Bride's, in the city of London, sum of 210*l.* 15*s.* 6*d.*, for arrears of rent due from W Armstrong to Frances Osborne at Christmas last; so doing this shall be a sufficient authority. As my hand this 14th day of January, 1832.

(signed) "William Gr

Special direction.

The defendant desired Brown to get the distres *forthwith, as there was a large quantity of furnitur auction-room.* On the defendant being informed th the plaintiffs were absent, he said, that, unless h get the distress levied at once, he must take it el to be done: whereupon Brown told him, that, as any one came in, it should be done.

Alteration of

Brown altered the warrant by erasing the

:s (directed to them, and to the defendant, and to :es Osborne) of claims to some of the goods by ten ent persons, as being their property: whereupon rs. Warlters & Co. handed over the notices to the tiffs, who immediately sent them to the defendant.

ı the same day, the plaintiffs sent Brown, their clerk, e defendant, to request that he would give them fur- directions, and an express indemnity, before they pro- :d further with the distress. The defendant thereupon : to the plaintiffs the following:—

"20th January, 1832.

We hereby undertake, on the part of Mrs. Osborne, to nnify you for proceeding to sell the goods distrained ıe premises No. 5 New Bridge Street. Indemnity.

"Brook, Grane, & Cooper."

ıe plaintiffs forwarded the above to Messrs. Warlters, ng thereto—"We hereby undertake to indemnify you ıe above matter."

n the 21st January, the goods distrained were con- ned, and some of them were removed from Armstrong's ıises to Messrs. Warlters' ware-rooms in Farringdon et, preparatory to a sale: of which removal the defend- had notice. On the 23rd, a clerk of Messrs. Warlters :d on the defendant, and stated that the attorney of the nants had called upon them, and said he had a note ı the defendant to give up the goods; when the *defend- said that Messrs. Warlters were to go on with his in- ctions till the same were contradicted.* On the 24th, the ndant called upon the plaintiffs, and told them they e to go on with the distress, and that he would give m a further guarantie. On the 25th, the defendant ed upon Messrs. Warlters, and said he would write to m that evening or the following morning, and that the ds were not to be removed till then. The goods so oved were advertised for sale on the 27th January.

Removal of the goods.

Communications between the plaintiffs, defendant, and Warlters.

now refuses to settle them. I regret I

Revocation of defendant's undertaking.

heard from you on the subject since T goods are not yet sold, *I must request* *letter to you of the 20th instant, cont taking* on the part of Mrs. Osborne *to selling* them, *as revoked.* I must leav your own discretion as to selling them o wish for any other indemnity or guara pleasure apply to Mrs. Osborne for her sa

(signed)

" for Brool

On the 31st, the defendant again wrot as follows :—

Letter of 31st January.

" Counsel advised that I should appear and myself alone, as I have not receive ters the authority to appear for himse others. This, therefore, I have directed they must take any consequences resulti giving me the necessary authority to Counsel also thinks that it is more haz than to sell, because the surplus (if any) tained and returned as speedily as poss way; and, if not, he thinks they may ha of action. At the same time. *I must le*

ltimately, *at the request of the present plaintiffs*, Messrs. ks, Grane, & Cooper entered appearances for all the ndants in the several actions. The sale was again rtised to take place on the 7th February. On the Messrs. Warlters offered to pay the costs and settle ctions, provided the defendant would consent to the s being returned; and the defendant was again ied to for an indemnity. On the following day, he essed a letter (in the name of his firm) to the plain- declining to give any indemnity, and concluding :—

In the meantime, we must leave it to your own etion to proceed with the sale of the goods seized, or but, as Mrs. Osborne's solicitors, *we wish the sale ke place when by law it ought.*

Letter of 7th February.

n the 29th February, the defendant wrote to the ıtiffs as follows :—

Counsel has again advised us that the goods ought to old, or the defendants may be prejudiced at the trial. will, of course, exercise your own descretion in this ect: but Mrs. Osborne must not be prejudiced: she s to you for compensation for any injury she may ain by reason of the goods not being sold in due e."

Letter of 29th February.

gain, on the 17th April :—

We presume that these goods have been sold, pur- nt to our directions and to the advice of counsel. If , we beg to know why they have not, and in whose session they now are; in order that we may immedi- ly consult with counsel as to the proper course to be en by Mrs. Osborne."

Letter of 17th April.

The case then set forth a long correspondence between parties, and a variety of unimportant facts. From se it appeared, that, ultimately, one of the actions be- alluded to was tried, and a verdict entered for the

thereon, and recovered against them 164
21*l.* 0*s.* 6*d.*, the costs of defending that
to 185*l.* 9*s.* 6*d.*, the sum sought to be
action.

Question.

The Court was to be at liberty to dr
of fact which a jury under the circumst
drawn; and the parties agreed to be
finding of the Court upon the whole
question for the opinion of the Court wa
the circumstances, the defendant was li
if he was, to what amount: the verdict
be entered accordingly.

The case was argued at the sittings in
Hilary Term.

As to the implied identity.

Wightman, for the plaintiffs.—The def
thority of the 14th January, 1832, and
duct, was bound to indemnify the plainti
quences arising from the making of t
party distrained upon being an auctic
quently the goods deposited with him fo
legcd from distress for rent, the mome
received notice of the fact, he should h
their being restored to their respective

that the seizure should take place *forthwith*, assigning for reason that *there was a great quantity of furniture in the auction-room*. He will probably now seek to excuse himself on the ground that he acted as agent for Mrs. Osborne. But he gave the authority as a principal; and it is scarcely likely that Mrs. Osborne knew anything of the transaction. The position of the parties is in no degree varied by the alteration which Brown made in the warrant: the original warrant was directed to "Messrs. Toplis, or their agent:" there must be subordinate agents to conduct proceedings of the kind. And from the 23rd January, the defendant was aware of, and by his acts assented to, the employment of Messrs. Warlters. There is no pretence for the set-off claimed: the defendant was bound to protect and defend the present plaintiffs and those set in motion by them in a manner recognised by himself: and the authority to defend which was extorted from the plaintiffs on the 1st February, 1832, makes no difference.

Alteration of the warrant.

Defendant cognizant of, and assenting to, the employment of Warlters.

W. H. Watson, for the defendant.—On the face of the warrant it appeared that the defendant was acting merely as the agent or attorney of Mrs. Osborne. No express indemnity was given anterior to the seizure; and an indemnity given subsequently will not do—Comyns's Digest, *Action upon the Case upon Assumpsit*, (F. 6.); *Payne* v. *Wilson*, 7 B. & C. 423, 1 M. & R. 708. The utmost that an authority of this sort, even when given by a principal, amounts to, is, an undertaking that the rent is due, and that the party for whom the distress is authorized to be made is the landlord: it is not a licence to commit irregularities. The defendant might have been liable had he given a specific authority to *sell* the goods, as in *Adamson* v. *Jarvis*, 4 Bing. 66, 12 Moore, 241, or had he made any false representation, with a view to his own profit, as in *Humphreys* v. *Pratt*, 2 Dow & Clarke, 288. But all the authority he professes to have, is, that of agent to Mrs.

Defendant a mere agent.

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Osborne to authorize the recovery of her rent by a legal distress. It appears that there were two descriptions of goods upon the premises—goods that were liable to be seized, and goods that were privileged: the defendant did not authorize the seizure of *all* the goods. [*Tindal*, C. J.—He pointed to the goods in the auction-room as a reason for acting with speed.] Undoubtedly, an undertaking or promise to indemnify may be implied—*Betts* v. *Gibbins*, 2 Ad. & E. 57, 4 N. & M. 64: but there are no facts here to warrant any such inference. In *Farebrother* v. *Ansley*, 1 Camp. 343, it was held that there is no implied promise on the part of a sheriff to indemnify an auctioneer who sells goods seized under a fi. fa., when employed to do so by the sheriff's officer to whom the warrant was directed, and the plaintiff's attorney in the original cause, although the sheriff certified to the Excise Office that he himself had seized and *sold the goods*, and he in fact received his poundage from the produce of the sale: and that, if an action of trespass is brought by the owner of the goods against the auctioneer, the sheriff, and others, all the damages awarded in which are levied upon the auctioneer alone, he has no action for a contribution against any of his co-defendants. In *Wilson* v. *Milner*, 2 Camp. 452, a levy was made on the goods of a trader after he had committed an act of bankruptcy, and the money levied was paid over to the party; an action of trover was afterwards brought by the assignees against him, the sheriff, and the bailiff, in which damages were recovered, and these, together with the costs, were paid by the bailiff: it was held there was no implied promise on the part of the plaintiff in the original suit to indemnify the bailiff, or to contribute to the damages and costs in the action of trover. The extent of an attorney's liability has been recently considered in the court of Exchequer, in a case of *Robins* v. *Bridge*, 3 M. & Welsby, 114. The question there was whether an attorney was personally liable for the expenses of a witness

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whom he had subpœnaed: and Lord Abinger, in delivering the opinion of the court, says: "This is the first case in which the question has arisen, whether there is an implied contract to pay the expenses of a witness, by the attorney or agent by whom he has been subpœnaed. It is sufficient for the decision in this case to say that there is no implied contract by the attorney to pay the witness. The attorney is known merely as the agent—the att rney of the principal, and is directed by the principal himself. The agent, acting for and on the part of the principal, does not bind himself, unless he offers to do so by express words; he does not make himself liable for anything, unless it is for those charges which he is himself bound to pay, and for which he makes a charge." In *Hartop* v. *Juckes*, 2 M. & Sel. 438, it was held that the solicitor under a commission of bankruptcy is not liable in the first instance to the messenger whom he nominates, for his bill of fees. The Court there said, "that the solicitor was not to be regarded in general as a principal, that the messenger is aware that he is not a principal, and upon the opening of the commission may ascertain who is the petitioning creditor; and, though the solicitor is the medium through which it is convenient to the messenger to receive his bill of fees, that will not make him a principal." In *Burrell* v. *Jones*, 2 B. & A. 47, the indemnity was express. It is clear here that the plaintiffs themselves treated the defendant as a mere agent, from their application to him on the 19th January, for an *express* indemnity. The indemnity given upon that occasion was a mere indemnity for *selling*, which was never acted upon. And that is an indemnity, not by the defendant, but by Brooks, Grane, & Cooper, as solicitors for Mrs. Osborne.

The authority improperly delegated to Warlters.

Then, the authority was given to Messrs. Toplis, and not to Messrs. Warlters. Delegata potestas non potest delegari. In Viner's Abridgment, *Authority*, (B), pl. 44, it is said: "All authorities, whether judicial or ministerial,

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or privately from one person to another, must be pursued; for, when one has no right to do a thing but by a derivative power, he must shew he has pursued his power; and especially, if the thing to be done be entire, and more is done than is warranted by the power, all is void." And in Bacon's Abridgment, *Authority*, (D.), it is said: "One who has an authority to do an act for another must execute it himself, and cannot transfer it to another; for, this being a trust and confidence reposed in the party, cannot be assigned to a stranger, whose ability and integrity were not so well thought of by him for whom the act was to be done." Any alteration avoids the authority. Thus, in *Burslem* v. *Fern*, 2 Wils. 47, where an attorney filled up the sheriff's warrant on a capias ad respondendem after it was signed, sealed, and sent to him with a blank, it was held bad. So, in *Housin* v. *Barrow*, 6 T. R. 122, the sheriff having directed a warrant to A. and all his other officers, to arrest B., A. afterwards inserted the name of C.; and it was held that the warrant was illegal, and the arrest by C. consequently void. [*Tindal*, C. J.—A very little will authorize a bailiff to enter: the question here is whether the defendant has not by his acts recognized the authority of the substituted party.] To enable a bailiff to enter, the authority must be *lawful*: here it is clear that Armstrong would have been justified in resisting the execution of the warrant. There is no evidence to shew that the defendant, in his communications with Messrs. Warlters, was aware that they were acting under an altered warrant. [*Bosanquet*, J.—Might not Messrs. Toplis & Son have cancelled the original warrant, and themselves made a fresh one to Messrs. Warlters?] It is enough to say they have not done so: they have, without the defendant's knowledge or consent, made the authority move from the defendant to Messrs. Warlters.

No implied contract to indemnify plaintiffs on

Supposing the alteration not to have rendered the warrant void, and supposing the defendant to have acquiesced

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in it, and adopted Messrs. Warlters as his agents, any contract of indemnity arising out of the circumstances would be with them, and not with Messrs. Toplis; and consequently the action is brought by the wrong party. Right or wrong, Messrs. Toplis must be bound by their act of alteration: their name no longer appearing upon the warrant, what right have they to claim an indemnity for any thing done under it?

the altered warrant.

1. Upon the state of facts in the special case, the defendant is entitled to have the verdict entered for him upon the first issue, inasmuch as he acted only as the agent of Mrs. Osborne; and, even if he must, under the circumstances, be held to have personally retained the plaintiffs, there was no promise, express or implied (*before the distress*), to indemnify the plaintiffs for seizing and distraining. 2. There is no evidence that the defendant assented to or even knew of the alteration of the warrant until long after the actions brought; and therefore the second issue should also be found for the defendant. 3. The evidence also preponderates in favour of the defendant upon the third issue. 4. There was evidence (particularly in the defendant's letter of the 28th January, 1832), that any direction given by him as to retaining the goods, was revoked; and therefore the verdict upon the fourth issue must also be for the defendant. 5. The fifth plea is supported by the retainer of the 1st February, 1832; the issue therefore upon that plea must be in favour of the defendant. 6, 7. The material allegation to which the sixth and seventh pleas are addressed, not having been proved, the defendant is likewise entitled to the verdict upon these issues. 8. There is ample evidence of negligence on the part of the plaintiffs in the conduct of the distress, to entitle the defendant to the verdict upon the eighth issue. 9, 10, 11. The plaintiffs having failed to establish any cause of action in respect of the second and subsequent counts, and the defendant's claim of set-off being sus-

Application of the facts to the several issues.

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tained by the facts, he is also entitled to the verdict upon the last three issues.

Reply.

Wightman, in reply.—It may be conceded, that, where the authority is upon the face of it an authority to do an illegal act, no implied indemnity arises—*Shackell* v. *Rosier*, 2 New Cases, 634, 3 Scott, 59, and the cases there cited. But, where the authority is, to do an act that is primâ facie legal, it does carry with it an implied indemnity against the consequences. For this it can hardly be necessary to cite authorities. Neither the authority here, nor the mode in which it was put in force, was primâ facie illegal. How could the plaintiffs know whether the goods, *which they had specific directions from the defendant to seize*, were privileged or not? The alteration in the paper is perfectly immaterial: it is not upon that that the indemnity contended for arises; and the virtue of the implied indemnity is in no degree diminished by the subsequent demand of an express indemnity, arising from the plaintiffs' ignorance of the extent of the defendant's existing liability. The warrant was directed to Messrs. Toplis *or their agent*. Messrs. Warlters are their agents. The defendant's liability upon his implied indemnity clearly cannot be affected by his having procured himself to be retained to defend the actions in the name of the plaintiffs and the other parties.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—

The declaration in this case consisted of a special count upon a promise of indemnity alleged to have been made by the defendant to the plaintiffs, and of the common indebitatus counts for work and labour, for money paid, and for money due upon an account stated. To the whole of which declaration the defendant pleaded non assumpsit, and to different parts of the declaration ten other pleas.

As it will be necessary to consider separately the issue raised upon each of these pleas, it will be most convenient to take them in their order, and to apply the facts found in the special case separately to each plea.

Special count.

The special count states, that, "in consideration that the plaintiffs, at the request of the defendant, would by themselves or their agents seize and distrain certain goods and chattels on certain premises for the recovery of certain arrears of rent alleged to be due to Frances Osborne, he the defendant undertook to indemnify and save harmless the plaintiffs from all loss, damage, costs, and charges which should or might arise or happen to or be incurred by them for or by reason of such seizure and distress of the said goods and chattels, or any of them.

First issue.

The plea of non assumpsit, so far as it relates to this special count, puts in issue the promise to indemnify as therein alleged; and, consequently, the first, and indeed the principle question raised upon the record, is, whether the promise to indemnify as laid in the declaration is supported or not by the evidence. And we are of opinion, that, upon such evidence given at a trial of this action, a jury would have inferred, and would have been justified in inferring, the promise to indemnify as laid in the declaration.

Implied indemnity in ordinary cases.

It is quite unnecessary to lay it down as a general rule of law, that the broker, who enters under an ordinary warrant of distress, and takes goods upon the premises that are privileged by law from distress, can look for indemnity from his employer. In most cases, the broker has a better opportunity of informing himself as to any exemption from the liability to distress which may belong to the goods found upon the premises, than the landlord or his agent can possibly have. The landlord and the agent, indeed, have frequently no opportunity whatever. To hold, therefore, as a general proposition, that the law gives in all cases an indemnity to the broker, would have

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Special circumstances out of which the indemnity in this case is implied.

the effect, in many, of throwing the consequences of his own wrongful act or want of caution from himself upon his employer; and would tend to render him generally careless in the discharge of his duty. But we think the facts stated in this special case would satisfy a jury that the defendant, by his conduct throughout the whole transaction, caused the plaintiffs to believe that they were acting under an indemnity from him, and that such indemnity, therefore, may be justly inferred to have been given. In the first place, the defendant knew that the premises on which the distress was to be taken were in the possession of the auctioneer, and that the lower part of the premises was used by him for the purpose of an auction-room. In the next place, by his warrant of distress, he directs the plaintiffs or their agent to seize and distrain "the *several* goods and chattels on the premises;" words that necessarily import his intention that no part of the goods found was to be left. In the third place, the defendant desires the distress to be levied *forthwith*, assigning as a reason to the plaintiffs' clerk, "that there was a large quantity of furniture in the auction-room;" which could not have been understood by the plaintiffs in any other sense than as a specific direction to take the furniture there found: the defendant adding, by way of urgency to his direction, that, "unless the plaintiffs could get the distress levied at once, he must take it elsewhere to be done." And, lastly, the request made by the plaintiffs to the defendant for an *express* indemnity before they proceeded further with the distress, shews that they had contemplated acting under an indemnity; and the express indemnity then given, to which the defendant was one of the subscribing parties, viz. an indemnity for proceeding to *sell* the goods, was calculated still further to assure the plaintiffs that the defendant originally intended to indemnify them; and, if so, the subsequent withdrawal by the defendant of such indemnity, whether right or wrong,

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could not have the effect of discharging him from his original responsibility. Add to this, that, on the 24th January, the defendant calls on the plaintiffs, and expressly tells them to go on with the distress, and he will give them a guarantie. And we think this evidence brings the case before us within the principle laid down by the court of King's Bench in *Betts* v. *Gibbins*, 2 Ad. & E. 57, 4 N. & M. 64, that, where an act has been done by the plaintiff under the express directions of the defendant, which occasions an injury to the rights of third persons, yet, if such act is not apparently illegal in itself, but is done honestly and bonâ fide in compliance with the defendant's directions, he shall be bound to indemnify the plaintiff against the consequences thereof. We therefore think, that, upon the first issue, the verdict must be entered for the plaintiffs.

Second issue. As to the employment of Warlters.

The second issue is, whether the defendant assented to the employment by the plaintiffs of Messrs. Warlters to make the seizure and distress: as to which the evidence was, that the warrant was originally directed to Messrs. Toplis or their agent, which implied a power to depute their authority to some one. On the 21st January, the defendant had notice that the goods had been removed from the premises to the warehouses of Warlters & Co., preparatory to a sale. No dissent is expressed on the part of the defendant. On the 23rd, a clerk of Messrs. Warlters calls on the defendant, and informs him that one of the claimants had demanded the delivery of the goods under a note from him the defendant, when the defendant answers that Messrs. Warlters & Co. were to go on with the defendant's instructions till the same were countermanded. And, again, on the 25th, there is a personal communication between the defendant and Messrs. Warlters & Co. We think these circumstances furnish abundant evidence for the jury to find this issue in favour of the plaintiffs.

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Alteration of the warrant.

An objection, however, was made, that, in the altered and erased state of the warrant, there was no legal evidence of the appointment of Messrs. Warlters & Co. But we think, as the alterations made were capable of proof, if not actually visible on the warrant, the reason and occasion of making them might also be explained to the jury; and that the result of the alteration was, that Messrs. Warlters & Co. were substituted for Messrs. Toplis, the plaintiffs. Notwithstanding this objection, therefore, we think the verdict may stand.

Third issue.

The third issue is on the point whether the defendant directed the plaintiffs to retain the goods, and caused the same to be retained, as alleged in the declaration: for the establishing the affirmative of which issue, we think it is enough to refer to the conversation between the defendant and Warlters & Co. on the 23rd January, the communication with the plaintiffs on the 24th, and the letter of the 29th January, from the defendant to the plaintiffs.

Fourth issue. As to the revocation of the *express* indemnity.

The fourth issue raised by the defendant, is, whether he, the defendant, after he had given the plaintiffs directions to retain the goods distrained, did afterwards and within a reasonable time after such direction given, and before the sale of the goods, and before any expenses incurred, wholly recall and revoke the said direction, and expressly leave it to the plaintiffs to exercise their own discretion to sell or not. The defendant for this purpose apparently relies on his letter of the 28th January. But this letter by no means amounts to a revocation of the directions given to retain and sell the goods, but is, in terms, no more than a revocation of Mrs. Osborne's indemnity given in the letter of the 20th. It is by no means clear from the terms of that letter that the defendant intended to exonerate the plaintiffs at all events from liability to Mrs. Osborne, in case they determined not to sell: whereas, the revocation, in order to satisfy the terms of the plea, ought to have been a clear and unequivocal discharge from the

previous directions to retain. And it appears afterwards, in contradiction of the supposed meaning of this letter, that Mr. Grane, as one of the attornies of Mrs. Osborne, on the 7th February, writes to the plaintiffs, that, "as her solicitors, they wish the sale to take place when by law it ought." And, again, on the 29th February, her attornies by letter give an express notice to the plaintiffs, "that Mrs. Osborne looks to them for compensation for any injury she may sustain by reason of the goods not being sold in due time." Under this evidence, we think it impossible for the jury to find that Mr. Grane expressly revoked his direction to retain the goods, and that this issue must be found also in favour of the plaintiffs.

Fifth issue. Retainer.

The fifth issue appears to us to be altogether immaterial. The plea upon which it arises is pleaded as to so much of the cause of action in the first count mentioned as relates to the defendant having defended the several actions mentioned in the first count to have been brought by the several claimants of the goods against Mrs. Osborne, the defendant, Messrs. Warlters & Co., and their servants; and it alleges that the defendant, as a partner with two other gentlemen as attornies, did defend those actions for Mrs. Osborne as her attornies, and for himself in his own protection, and for Messrs. Warlters & Co. and their servants, as the attornies of the plaintiffs and by their retainer. Upon which allegation the issue is taken. And it seems to us altogether immaterial to the question of damage sustained by the plaintiffs by reason of those actions having been defended by them, whether they did or did not retain the attornies who appeared for them, provided such defence was a necessary consequence of and covered by the indemnity of the defendant. Upon this issue, therefore, we think no verdict should be entered on either side, but that the jury should be considered as having been discharged.

Sixth and seventh issues.

The sixth issue does in effect raise the question of the amount of the damages sustained by the plaintiffs, sup-

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posing them entitled to recover. And, upon the means of calculation afforded us by the statements in the case, we think those damages amount to 185*l.* 9*s.* 6*d.* The seventh issue is substantially the same as the sixth; and both must be found for the plaintiffs.

Eighth and eleventh issues.

The eighth and the eleventh issues each depends upon the same consideration. The defence set up in the eighth plea, which is pleaded to the first count, is, that the plaintiffs were damnified through the negligence, misconduct, and default of themselves and their servants. The defence set up by the eleventh plea, which is pleaded to the indebitatus counts, is, that the work and labour &c. of the plaintiffs became wholly useless to the defendant through their want of care and skill. Both these issues, therefore, depend on this consideration—was it the duty of the plaintiffs or their agents to ascertain that the goods seized were not privileged by law, before they made the seizure? And we think, that, although such duty may be cast upon the broker in cases of ordinary distresses for rent, or, at all events, the duty of using proper care and diligence in ascertaining that the distress may be safely made; yet, in this case, the defendant by his conduct dispensed with it: for, he knew the circumstances under which the goods were taken to and left upon the premises, and, with such knowledge, he directed the plaintiffs or their agent to seize all the goods found on the premises, for the rent due; thereby removing all suspicion or motive for inquiry on the part of the plaintiffs. These issues, therefore, we also think should be found for the plaintiffs.

Negligence and want of skill.

Ninth and tenth issues.
Set-off.

As to the ninth issue, upon a plea of set-off of a debt alleged to be due from the plaintiffs to Messrs. Brooks, Grane, & Cooper, there is no evidence whatever to satisfy the allegation in the plea, that the promises in the indebitatus counts of the declaration were made by those persons jointly with the defendant, and not by the defendant alone, without which evidence the set-off of a joint debt could not

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be made available. On the contrary, as it appears to us, the evidence shews that the indebitatus counts are founded upon the transactions between the plaintiffs and the defendant alone. And as to the tenth issue, raised on the plea of set-off of the bill for business due to the defendant, the evidence is not of a separate retainer of the defendant, but of the three attornies as partners. Upon the ninth and tenth issues, therefore, we think the verdict is in favour of the plaintiffs.

Upon the whole, we think the plaintiffs are entitled to judgment in the manner above stated.

Judgment accordingly.

FENDALL *v.* NOKES.

Thursday, May 23rd.

The mere circumstance of a party being the attorney in the cause will not make him responsible for refreshments supplied by a coffee-house keeper to the witnesses while attending the trial. But the fact of his being found in communication with the witnesses at the coffee-house, is *some* evidence to go to the jury, that the supplies were sanctioned by him.

THIS was an action of assumpsit brought by the plaintiff, the proprietor of an hotel near Westminster-Hall, to recover from the defendant, who was attorney for the plaintiff in a cause of *Lord Langford* v. *Barrett*, a sum of 33*l.*, for refreshments supplied to the witnesses in that cause.

The defendant paid into court 10*l.*, denying his liability ultrà that sum.

At the trial, before Bosanquet, J., at the Sittings at Westminster in Trinity Term last, it appeared that the witnesses assembled at the plaintiff's house early on the morning of the trial, and that Lord Langford himself was there, and desired them, in the presence of a waiter, to make themselves comfortable, and to call for what they liked. There was contradictory evidence as to whether or not the defendant himself (who, it was admitted, was attorney for the plaintiff in the cause) was at the hotel; but it was proved that his clerk was there several times in the course of the day, and partook of refreshments.

The learned judge conceiving that there was *some* evi-

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dence for the jury, declined to nonsuit the plaintiff: he told the jury that it was the attorney's duty to get the witnesses together, and have them in attendance; and he left it to them to say whether the defendant had by his conduct so sanctioned the supplies to the witnesses as to pledge his credit for them, and whether the sum paid into court was in their judgment sufficient.

The jury having found for the plaintiff—damages 5*l.*—

Atcherley, Serjeant, pursuant to leave reserved to him, obtained a rule nisi for a nonsuit.

R. V. Richards and *Humfrey* now shewed cause.—The question is, not whether the evidence given at the trial was sufficient to sustain the verdict, but whether there was *any* evidence to go to the jury. If Nokes himself was not at the hotel during any part of the day, the fact of his clerk being there, and taking refreshments with the witnesses, was not disputed. That clearly was *some* evidence, though but slight, that the supplies were sanctioned by the defendant. Besides, by paying money into court, he admits his liability for something.

Atcherley, Serjeant, and *Henderson*, in support of the rule.—The mere circumstance of the plaintiff being the attorney in the cause, is no ground for charging him for refreshments furnished to the witnesses. In *Robins* v. *Bridge*, 3 M. & Welsby, 114, it was expressly decided that the attorney in a cause is not personally liable to a witness whom he subpœnaes to give evidence in a cause, for his expenses of attendance. Lord Abinger, in delivering the judgment of the court, there says: "The attorney is known merely as the agent—the attorney of the principal—and is directed by the principal himself. The agent, acting for and on the part of the principal, does not bind himself, unless he offers to do so by express words; he does not

make himself liable for any thing, unless it is for those charges which he is himself bound to pay, and for which he makes a charge. If therefore he employs a stationer to do anything for which he makes a charge, he is liable, as he is for the fees of the officers of the court; for, these are ready money transactions, for which the person engaged in the business of the court is liable; for, it cannot be presumed that the client would authorize him to pledge his credit where no credit is given. It is known the marshal does not receive his fees from the party, but, on the contrary, from the attorney, who is daily practising there, and who is bound to pay, and not his client. But, in the case of a witness, it is different; he has no course of dealing with the attorney; he knows it is for the party that he is to give evidence; his obligation is to the party, and, if he fails to attend, it is the party's loss. By the 5 Eliz. c. 9, s. 12, he may demand a reasonable sum for his expenses before he leaves home, if he lives at a distance, on his subpœna being served, and he may refuse to attend unless those expenses are paid; and, if he is unwilling to accept the undertaking of the party, he may waive his right on receiving an undertaking from the attorney; but, if he does not get it before the trial, or gives his evidence in court without the undertaking, no contract can be implied afterwards by the agent, who has no interest in his attending, and can make no professional charge for what may be called his expenses. Therefore, as it must be presumed that the parties are aware of the law which obliges the party in the cause to furnish the witness with his expenses, either to be paid at the time of serving the subpœna or before he leaves home, if without this he chooses to give his evidence, there is nothing to bind the attorney, either express or implied." And the rule of law is in no degree varied by the fact of the attorney or his clerk appearing at the coffee-house in the course of the day, for the purpose of looking after the witnesses. The evidence clearly shews that credit was given to Lord Langford, and

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not to the present defendant. Payment of money into court, unless in the case of a contract that is special and single, is no admission of liability beyond the sum paid in—*Stoveld* v. *Brewin*, 2 B. & A. 116; *Long* v. *Greville*, 4 D. & R. 632, 3 B. & C. 10; *Seaton* v. *Benedict* 2 M. & P. 66, 5 Bing. 28; *Meager* v. *Smith*, 1 N. & M. 449, 4 B. & Ad. 673; *Lucy* v. *Walrond*, 5 Scott, 52.

TINDAL, C. J.—If the question were whether or not there should be a new trial in this case, on the ground that the evidence did not warrant the verdict, I am not prepared to say that I should have felt disposed to allow the verdict to stand; for, there was evidence (though it was incomplete) that Lord Langford was the party from whom the order was received and to whom the credit was given. But the amount of the verdict prevents the case from being presented to us in that view. The only question is whether there was a *total* absence of evidence to fix this defendant. I am not prepared to say that the evidence was so entire a blank that there was nothing to leave to the jury. There was evidence that a person who was addressed as "Mr. Nokes," and the clerk who assisted in the conduct of the cause, were moving backwards and forwards between the court and the coffee-house in the course of the day: and we cannot shut our eyes to the manner in which these things are usually done; it would be impossible for the attorney to carry on the business of the cause, without going from time to time to see that his witnesses are in readiness. On the other hand, there was no express evidence to shew that Lord Langford was the party to whom the credit was given: all the evidence to affect him was, that he expressed a wish that the witnesses should make themselves comfortable and order what they liked. Upon the whole, I cannot say that the evidence, such as it was, should have been withdrawn from the jury; and therefore I think the rule must be discharged.

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BOSANQUET, J.—The only question is, whether or not I was *bound* to nonsuit the plaintiff. I thought at the trial, and I still think, that there was *some* evidence for the jury, and that I should have acted improperly in withdrawing it from them.

COLTMAN, J.—If the question had been whether or not there should be a new trial, I should have felt no hesitation: and, with deference to the rest of the court, I must say I am by no means satisfied that the evidence given at the trial established even a primâ facie case against the defendant. The mere fact of the attorney and his clerk calling at the coffee-house to look after the witnesses, does not appear to me to be sufficient to charge the former. I think the hotel-keeper ought to ask the question, before he assumes that the refreshments are furnished upon the credit of the attorney.

ERSKINE, J.—It was admitted at the trial that the defendant was Lord Langford's attorney: but that, I agree, would of itself be no ground for charging him. To entitle the plaintiff to succeed in this action, it was incumbent on him to shew either that the defendant expressly authorized the supply of refreshments to the witnesses, or that he so conducted himself as to warrant the jury in implying that he was conscious the credit was given to him. Although I must confess I have a difficulty in reconciling the finding of the jury with the facts proved, still I think the case was not left so totally destitute of evidence as to warrant the learned judge in withdrawing it from the jury. The rule for a nonsuit must therefore be discharged.

Rule discharged.

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Saturday, May 25th.

MARTHA EDWARDS *v.* THE BISHOP OF EXETER, and EDWARD JAMES TODD, Clerk.

The right of presentation given to the Universities by the statutes 3 Jac. 1, c. 5, ss. 18, 19, 20, 1 W. & M. c. 26, s. 2, and 12 Anne, st. 2, c. 14, s. 1, arises only in the case of a *sole* patron or *all* of several co-patrons professing the Roman Catholic religion. Where two are jointly seised of an advowson, the one being a Roman Catholic, the other a protestant, the sole right of presentation is in the latter.

QUARE IMPEDIT. The first count stated, that, theretofore, to wit, on the 1st January, 1763, Robert Edward, Lord Petre, was seised of the advowson of a certain church, to wit, the church of Combpyne, as in gross by itself, as of fee and right, to wit, at Combpyne aforesaid, and being so seised thereof, the said Robert Edward, Lord Petre, on the day and year aforesaid, at Combpyne aforesaid, by his deed in writing, sealed with his seal, granted to Robert Kerslake the then first and next avoidance, presentation, and vacancy of the church last aforesaid, for one turn only, when it should next happen to be vacant; by virtue of which grant the said Robert Kerslake became and was possessed of the advowson of the said last-mentioned church for such term as aforesaid; and, the said Robert Kerslake being so possessed thereof, the said last-mentioned church afterwards, to wit, on the 1st August, in the year aforesaid, became vacant by the cession of Nicholas Baker, clerk, the then last incumbent of the same church; which avoidance of the last-mentioned church by the cession of the said Nicholas Baker was the first and next avoidance thereof after the making of the said grant by the said Robert Edward, Lord Petre, to the said Robert Kerslake as aforesaid; whereupon the said Robert Kerslake afterwards, to wit, on the 25th August, in the year aforesaid, at Combpyne, presented one John Rendall, his clerk, to the said last-mentioned church, so being vacant as aforesaid; and the said John Rendall was thereupon then and there admitted and instituted to and inducted into the said last-mentioned church, on the presentation of the said Robert Kerslake, in time of peace, in the reign of the Lord George the Third, late king of Great Britain: And the said Robert Edward, Lord Petre, being so seised, afterwards, to wit, on the 28th June, 1797,

Lord Petre, seised of the advowson, granted the next avoidance to Kerslake.

Kerslake presented one John Randall.

June 28, 1797, Lord Petre, by indenture, con-

at Combpyne aforesaid, by a certain indenture then and there made between the said Robert Edward, Lord Petre, of the first part, Robert Edward, Lord Petre, of the second part, Joshua Harcombe of the third part, and Samuel Brown of the fourth part, and sealed with the seal of the said Robert Edward, Lord Petre, in consideration of a certain sum of money, to wit, 6,000*l.*, by the said Joshua Harcombe then and there paid to the said Robert Edward, Lord Petre, he the said Robert Edward, Lord Petre, granted (amongst other things) the advowson of the said last-mentioned church to the said Joshua Harcombe and Samuel Brown; to have and to hold the same to the use of Joshua Harcombe and Samuel Brown and their heirs, to the use of such person or persons for such estate and interest as the said Joshua Harcombe should by deed appoint, and, in default of appointment thereof, to the said Joshua Harcombe for life; and, after the determination of that estate, to the use of the said Samuel Brown and his heirs during the life of the said Joshua Harcombe; and, after the determination of that estate, to the use of the said Joshua Harcombe, his heirs and assigns; whereupon and whereby, and by force of the statute made for transferring uses into possession, the said Joshua Harcombe became and was seised of the said advowson of the said last-mentioned church as of freehold for the term of his life, with remainder to the said Samuel Brown and his heirs during the life of the said Joshua Harcombe, with remainder to the said Joshua Harcombe, his heirs and assigns: And, the said Joshua Harcombe being so seised as aforesaid, afterwards, to wit, on the 7th September, 1799, at Combpyne aforesaid, by a certain indenture then and there made between the said Joshua Harcombe and one John Knight of the first part, one Charles Edwards of the second part, and the said Samuel Brown of the third part, and sealed with the seal of the said Joshua Harcombe, he the said Joshua Harcombe granted the said advowson of the said last-men-

veyed the advowson to Harcombe and Brown.

Harcombe being seised, Sep. 7, 1799, granted the advowson to Brown, to the use of C. Edwards, for the life of C. Edwards the younger.

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tioned church unto the said Samuel Brown, to have and to hold the same unto the said Samuel Brown, his heirs and assigns, to the use of the said Charles Edwards, his heirs and assigns, for and during the life of one Charles Edwards the younger; provided always, that, from and after the said Charles Edwards the younger should be presented to the rectory of the said last-mentioned church as incumbent thereof, or should have for one year been capable of accepting and holding the rectory of the said last-mentioned church as incumbent thereof, then the said grant by the said last-mentioned indenture made should cease and become void, it being by the said last-mentioned indenture declared not to be the intention of the parties thereto, that, after the said Charles Edwards the younger should have become capable of holding the rectory of the said last-mentioned church, the said Charles Edwards, party thereto, his heirs or assigns, should have any right to present any other person than the said Charles Edwards the younger to be incumbent of the said last-mentioned church, or that, in case of the resignation, cession, or vacation of the said last-mentioned church by the said Charles Edwards the younger, any further or other presentation should be made by the said Charles Edwards party thereto, his heirs or assigns, under or by virtue of the said last-mentioned indenture; whereupon and whereby, and by force of the statute aforesaid, the said first-mentioned Charles Edwards became and was seised of the said advowson of the said last-mentioned church, as of freehold, for the term of the life of the said Charles Edwards the younger, with remainder to the said Joshua Harcombe and his heirs: And, the said first-mentioned Charles Edwards being so seised as aforesaid, afterwards, and in the lifetime of the said Charles Edwards the younger, and before the said Charles Edwards the younger had become capable of accepting or holding the rectory of the said last-mentioned church, to wit, on the 11th November, 1802,

Proviso.

Edwards being so seised, and the church becoming vacant by the death of John Rendall,

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at Combpyne aforesaid, the said last-mentioned church became vacant by the death of the said John Rendall, the then last incumbent of the same church; and the said last-mentioned church being so vacant as last aforesaid, afterwards, and in the lifetime of the said Charles Edwards the younger, and before the said Charles Edwards the younger had become capable of accepting or holding the rectory of the said last-mentioned church, to wit, on the day and year last aforesaid, at Combpyne aforesaid, the said first-mentioned Charles Edwards presented one John Colmer his clerk, who upon such presentation was then and there admitted and instituted to the said last-mentioned church, and inducted into the same: And the said Joshua Harcombe afterwards, to wit, on the 20th February, 1803, at Combpyne, aforesaid, died so seised of the said advowson of the said last-mentioned church, having made his last will and testament in writing, duly executed and attested to pass real estate; whereby the said Joshua Harcombe devised the reversion of one undivided fourth part of the said advowson of the said last-mentioned church to one Joshua Cuff and his heirs; and the reversion of the remaining three undivided fourth parts of the said advowson of the said last-mentioned church descended and came to one Thomas Cuff as nephew and heir of the said Joshua Harcombe, that is to say, eldest son of Elizabeth Cuff, wife of John Cuff, who in her life-time was the sister of the said Joshua Harcombe, and who died in the life-time of the said Joshua Harcombe; whereupon and whereby the said Thomas Cuff became and was seised as of fee and right of the reversion of three undivided fourth parts of the said advowson of the said last-mentioned church, and the said Joshua Cuff became and was seised as of fee and right of one undivided fourth part of the said advowson of the said last-mentioned church: And, the said last-mentioned Charles Edwards being so seised as aforesaid, afterwards, and in the life-time of the said Charles Edwards the younger,

John Colmer presented.

Harcombe died seised Feb. 20, 1803, having by his will devised an undivided fourth part of the advowson to J. Cuff, the remaining three fourths descending to one T. Cuff.

Edwards, the church becoming vacant by the death of Colmer. Sept. 20, 1805,

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and before the said Charles Edwards the younger had become capable of accepting or holding the rectory of the said last-mentioned church, to wit, on the 20th of September, 1805, at Combpyne aforesaid, the said last-mentioned church became void by the cession of the said John Colmer, the then last incumbent of the same church; and the said last-mentioned church being so vacant as last aforesaid, afterwards, and in the life-time of the said Charles Edwards the younger, and before the said Charles Edwards the younger had become capable of accepting or holding the rectory of the said last-mentioned church, to wit, on the day and year last aforesaid, at Combpyne aforesaid, the said first-mentioned Charles Edwards presented one Francis Palmer his clerk, who upon such presentation was then and there admitted and instituted to and inducted into the said last-mentioned church: And, the said first-mentioned Charles Edwards being so seised as aforesaid, afterwards, and in the lifetime of the said Charles Edwards the younger, and before the said Charles Edwards the younger had become capable of accepting or holding the rectory of the said last-mentioned church, on the 6th August, 1807, at Combpyne aforesaid, the said last-men-mentioned church became vacant by the cession of Francis Palmer the then last incumbent thereof: And, the said last-mentioned church being so vacant as last aforesaid, the said first-mentioned Charles Edwards afterwards, and in the lifetime of the said Charles Edwards the younger, and before the said Charles Edwards the younger had become capable of accepting or holding the rectory of the said last-mentioned church, to wit, on the day and year last aforesaid, at Combpyne aforesaid, presented one Edward Cook Forward, his clerk, who upon such presentation was afterwards, to wit, on the day and year last aforesaid, at Combpyne aforesaid, admitted and instituted to and inducted into the said last-mentioned church: And, the said Thomas Cuff and Joshua Cuff being so respectively seised as afore-

presented one Francis Palmer.

Church vacant by the cession of Palmer.

Edwards presented E. C. Forward.

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said, afterwards, and whilst the said last-mentioned church was so full of the said Edward Cook Forward as aforesaid, to wit, on the 1st November, in the year last aforesaid, at Combpyne aforesaid, the said Charles Edwards the younger died; whereupon and whereby the said Thomas Cuff and Joshua Cuff became and were severally and respectively seised as of fee and right of the said advowson of the said last-mentioned church, as tenants in common thereof: And, the said Thomas Cuff and Joshua Cuff being severally and respectively seised as last aforesaid, afterwards, to wit, on the 10th December, in the year last aforesaid, at Combpyne aforesaid, by a certain indenture then and there made between the said Thomas Cuff of the first part, the said Joshua Cuff of the second part, Anne Knight of the third part, and William Knight and the said first-mentioned Charles Edwards of the fourth part, sealed with the seal of the said Thomas Cuff, he the said Thomas Cuff, granted unto the said William Knight and the said Charles Edwards party thereto, amongst other things, the said three undivided fourth parts of the said advowson of the said last-mentioned church, to have and to hold the said three undivided fourth parts of the said last-mentioned advowson unto the said William Knight and the said Charles Edwards party thereto, their heirs and assigns, that is to say, as to two undivided fourth parts thereof, to the use of such person or persons, and in such manner as the said William Knight by deed should appoint, and, in default thereof, to the use of the said William Knight and his assigns for his life, with remainder to the use of the said Charles Edwards party thereto, and his heirs, during the life of the said William Knight, with remainder to the use of the said William Knight, his heirs and assigns; and, as to the one other undivided fourth part of the said advowson, to the use of such person or persons and in such manner as the said Charles Edwards party thereto should as therein mentioned direct, limit, or appoint, and, in de-

Death of C. Edwards the younger, Nov. 1, 1807.

By indenture of Dec. 10, 1807, the advowson became vested as to one undivided fourth part in J. Cuff, as to two undivided fourth parts in Knight, and as to the remaining fourth, in C. Edwards.

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fault thereof, to the use of the said Charles Edwards party thereto and his assigns for his life, with remainder to the use of the said William Knight and his heirs during the life of the said Charles Edwards party thereto, with remainder to the use of the said Charles Edwards party thereto, his heirs and assigns; whereupon and whereby the said Joshua Cuff in one undivided fourth part of the said advowson of the said last-mentioned church, held himself in and was seised thereof as of fee and right; and whereupon and whereby, and by force of the statute aforesaid, the said William Knight became and was seised as of freehold of the said two undivided fourth parts of the said advowson of the said last-mentioned church for the term of his life, with remainder to the said first-mentioned Charles Edwards and his heirs during the life of the said William Knight, with remainder to the use of the said William Knight, his heirs and assigns; and whereupon and whereby, and by force of the statute aforesaid, the said first-mentioned Charles Edwards became and was seised as of freehold for the term of his life of one undivided fourth part of the said advowson of the last-mentioned church, with remainder to the said first-mentioned Charles Edwards, his heirs and assigns: And, the said Joshua Cuff and William Knight and the said first-mentioned Charles Edwards being so severally and respectively seised as aforesaid, afterwards, to wit, on the 11th December, in the year last aforesaid, at Combpyne aforesaid, by a certain indenture then and there made between the said Joshua Cuff of the one part, and the said first-mentioned Charles Edwards of the other part, sealed with the seal of the said Joshua Cuff, he the said Joshua Cuff granted to the said Charles Edwards his the said Joshua Cuff's one undivided fourth part of the said advowson of the said last-mentioned church, to have and to hold the said one undivided fourth part of the said last-mentioned church to the said first-mentioned Charles Edwards, his heirs and assigns; whereupon and whereby the said first-

Dec. 11, 1807. J. Cuff conveyed his fourth part of the advowson to C. Edwards.

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mentioned Charles Edwards became and was solely seised as of fee and right of the said last-mentioned one undivided fourth part of the said advowson of the said last-mentioned church: And, the said first-mentioned Charles Edwards and the said William Knight, being so severally and respectively seised as last aforesaid, afterwards, to wit, on the 11th April, 1813, at Combpyne aforesaid, the said first-mentioned Charles Edwards died, having made and published his last will and testament in writing, duly executed and attested so as to pass real estate, whereby he devised the said two several undivided fourth parts of the said advowson of the said last-mentioned church to the said plaintiff, to have and to hold the same to her and her heirs; whereupon and whereby the plaintiff became and was seised as of fee and right of two undivided fourth parts of the said advowson of the said last-mentioned church: And, the plaintiff and the said William Knight being so severally and respectively seised as aforesaid, afterwards, to wit, on the 11th November, 1836, the said last-mentioned church became vacant by the death of the said Edward Cook Forward, the then last incumbent of the said last-mentioned church: By means whereof, and because the said William Knight, at the time when the said last-mentioned church so became vacant as last aforesaid, was and from thence continually had been and still was a person professing the Roman Catholic religion, it did and doth belong to the plaintiff to present a fit person to the said last-mentioned church at this vacancy; but the defendants unjustly hindered and disturbed her therein (138).

C. Edwards died April 11, 1813, having by his will devised his two undivided fourth parts of the advowson to the plaintiff.

Plaintiff and Knight being so seised, the church became vacant Nov. 11, 1836, by the death of E. C. Forward.

Knight being a Roman Catholic, the right of presentation vested in plaintiff.

Disturbance.

And the said bishop said that the said several churches were and each of them was within the diocese of Exeter, and that he claimed nothing therein or in the advowson of the same churches or either of them respectively, except

First plea.

(138) There was a second count, with a plea thereto, upon which issue was joined.

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the admission, institution, and induction of parsons thereunto, and the exclusion of them therefrom, and all such other things belonging to him as ordinary of the places in the said declaration mentioned: And the said Edward James Todd pleaded that he was the parson impersonate of the said church by the collation of the said bishop: And the said bishop and Edward James Todd further pleaded that the plaintiff ought not to have her said action against them, because they said that true it was that the said William Knight and the plaintiff were so severally and respectively seised of the said church in that count mentioned as therein stated, at the time when the church became and was vacant by the said death of the said Edward Cook Forward as in the said first count mentioned, to wit, on the 11th November aforesaid, and the said William Knight and the plaintiff remained, continued, and were so severally and respectively seised of and in the last-mentioned church continually until and at and after the time of the collation thereinafter mentioned, whereof the said bishop had at all times had notice: that the said church of Combpyne became vacant by the death of the said Edward Cook Forward on a certain day, to wit, on the 9th November, 1836, and continued so vacant thence until the the 28th October, 1837: that afterwards, and before six months had elapsed after the said vacancy, to to wit, on the day and year aforesaid, the plaintiff presented to the bishop as and being such ordinary as aforesaid, to be by him as such ordinary admitted, instituted, and inducted into the last-mentioned church, a certain clerk, to wit, one Richard Bradley; that thereupon, and *because the said William Knight had not joined or in any manner concurred in the said presentation of the said Richard Bradley* to the said bishop, to be by him so admitted, instituted, and inducted as aforesaid, *and not otherwise, the said bishop then declined and refused to accept, and rejected such presentation of the said Richard Bradley* as

Presentation of plaintiff's clerk rejected, the co-patron not joining.

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aforesaid, as it was lawful for him to do, and then and there on that occasion declared and assigned his the said bishop's reason and ground for so declining and refusing to accept, and for so rejecting, such presentation as aforesaid, to be, the neglect and omission of the said William Knight to concur or join in the said presentation: that afterwards, and before the said 28th October, on 10th May in the year last aforesaid, more than six months elapsed from the commencement of the said vacancy, and that no presentation whatsoever of a clerk to the said bishop to be admitted and instituted and inducted into the church except as in this plea aforesaid had at any time been made, submitted, or tendered to the said bishop: that afterwards, to wit, on the said 28th October, 1837, at Combpyne aforesaid, the said bishop collated the said church so vacant to the said Edward James Todd, clerk, for that the six months after the avoidance of the said church were before then fully elapsed, so that the right of collating had devolved to the said bishop as ordinary of that place, as it was lawful for him to do: that, although true it was that the said William Knight, at the time when the last-mentioned church became vacant was and thence continually had been and still was a person professing the Roman Catholic religion; yet the said bishop said that no notice whatever was given to the said bishop until long after the right of collating the said church so vacant to the said Edward James Todd, clerk, had devolved to the said bishop as such ordinary as aforesaid—verification.

Lapse.

Collation of defendant Todd.

That the bishop had no notice before such collation that Knight was a Roman Catholic.

The plaintiff replied that notice that the said William Knight was a person professing the Roman Catholic religion, was given to the said bishop before any right of collating the said church so vacant to the said Edward James Todd had devolved to the said bishop as such ordinary as aforesaid, and before the plaintiff presented to the said bishop the said Richard Bradley, her said clerk, as in

Replication—that the bishop had notice that Knight was a Roman Catholic.

[illegible]

[illegible]

[illegible]

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plaintiff's co-tenant was a Catholic only before his right to collate had accrued, became wholly immaterial and irrelevant, and amounted only to this, that the bishop collated by lapse with a knowledge at the time that a patron was in esse who neglected to come forward.

Argument for the defendants.

Kelly, in support of the demurrer.—The main question is, whether one of two tenants in common of an advowson, the other being a person professing the Roman Catholic religion, has a right singly and severally to present to the living, and whether the ordinary is bound to accept the person so presented; or whether he may not reject him, and after a lapse himself present.

1. Right of the Roman Catholic co-patron vested in the University.

1. The right of the co-patron Knight, by virtue of the statutes relating to Roman Catholics, became vested under the circumstances disclosed on the face of the count, in the University of Oxford, who thereby acquired all the rights that Knight possessed, and should have concurred with the other co-patron in presenting a clerk to the bishop. By the 3 Jac. 1, c. 5, s. 18, it is enacted "that every person or persons that is or shall be a popish recusant convict, *during the time that he shall be or remain a recusant*, shall be utterly disabled to present to any benefice, with cure or without cure, prebend, or any other ecclesiastical living, or to collate or nominate to any free-school, hospital, or donative whatsoever, and shall likewise be disabled to grant any avoidance to any benefice, prebend, or other ecclesiastical living:" and by s. 19, "that the Chancellor and scholars of the University of Oxford, so often as any of them shall be void, shall have the presentation, nomination, collation, and donation of and to every such benefice, prebend, or ecclesiastical living, school, hospital, and donative, set, lying, and being in the counties of Oxford, Kent, Middlesex, Sussex, Surrey, Hampshire, Berkshire, Buckinghamshire, Gloucestershire, Worcestershire, Staffordshire, Warwickshire, Wiltshire, Somerset-

3 Jac. 1, c. 5, s. 18—recusants convict disabled from presenting to a benefice, or granting an avoidance.

Section 19—vesting the right in the University.

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shire, Devonshire, Cornwall, Dorsetshire, Herefordshire, Northamptonshire, Pembrokeshire, Caermarthenshire, Brecknockshire, Monmouthshire, Cardiganshire, Montgomeryshire, the city of London, and in every city and town, being a county of itself, lying and being within any of the limits or precincts of any of the counties aforesaid, or in or within any of them, as shall happen to be void during such time as a patron thereof shall be and remain a recusant convict as aforesaid." (139) This disability is extended by the 1 W. & M. c. 26, the 2nd section of which enacts, " that every person who shall refuse or neglect to make, repeat, and subscribe the declaration mentioned in one act of this present parliament [c. 15], intituled 'An act for the better securing the government by disarming papists and reputed papists,' when the same shall be tendered to such person by any two or more justices of the peace, as in the said act is enacted, or who shall upon notice given as in the said act directed, refuse or forbear to appear before them for the making, repeating, and subscribing thereof, and shall thereupon have his name, surname, and usual place of abode certified and recorded at the General Quarter Sessions to be holden for the shire, riding, division, or liberty for which such two justices shall be justices of the peace, by the clerk of the peace or town clerk as in the said act is appointed; every such person so recorded shall be, from and after the time of such record made, adjudged, taken, and esteemed disabled to make such presentation, collation, nomination, donation, or grant of

1 W. & M. c. 26, s. 2—extension of disability to persons refusing to make the declaration prescribed by the 30 Car. 2, st. 2, s. 3.

(139) Section 20 confers the same right on the Chancellor and scholars of the University of Cambridge, as to livings &c. in the counties of Essex, Hertfordshire, Bedfordshire, Cambridgeshire, Huntingdonshire, Suffolk, Norfolk, Lincolnshire, Rutlandshire, Leicestershire, Derbyshire, Nottinghamshire, Shropshire, Cheshire, Lancashire, Yorkshire, the county of Durham, Northumberland, Cumberland, Westmorland, Radnorshire, Denbighire, Flintshire, Carnarvonshire, Angleseyshire, Merionethshire, Glamorganshire, and in every city and town, being a county of itself, lying within any of the limits and precincts of any of those counties.

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any avoidance of any benefice, prebend, or ecclesiastical living, as fully and amply as if such person were a popish recusant convict by the laws or statutes of this realm, any law, statute, or usage to the contrary notwithstanding; and that the Chancellor and scholars of the university of Oxford, and the Chancellor and scholars of the University of Cambridge, by what name or names soever they or either of them are incorporated, shall respectively have the presentation, nomination, collation, and donation of and to every such benefice, prebend, or ecclesiastical living, school, hospital, and donative, set, lying, and being in the respective counties, cities, and other the places and limits in the said act of the third of King James mentioned, as in and by the said act is directed and appointed, so often as any of them shall become void, according to the limitations, directions, and provisions in that behalf limited, enacted, and provided." And by the 12 Anne, st. 2, c. 14, s. 1, reciting, "that, for as much as by an act of parliament made in the third year of the reign of King James the First, intituled 'An act to prevent and avoid dangers which may grow by Popish recusants,' and also one other act made in the first year of the reign of their late majesties King William and Queen Mary, intituled 'An act to vest in the two Universities the presentations of benefices belonging to Papists,' the presentation, nomination, collation, and donation of and to benefices, prebends, or ecclesiastical livings, schools, hospitals, and donatives belonging to Popish recusants and other persons thereby disabled to present, collate, or nominate, are given to the two Universities; but they are so given only where such persons are and stand *convicted* by such ways and means as in the said recited acts are mentioned and provided; which acts do nevertheless prove ineffectual for such purposes, by reason such patrons are not convicted, or not in such manner as the said acts do direct and appoint"—for making the said laws more effectual, and for the speedier and easier vesting the

12 Anne, st. 2, c. 14, s. 1.

Recital of the 3 Jac. 1, c. 5, and

1 W. & M. c. 26.

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Extension of recited acts to all persons professing the Roman Catholic Religion.

presentations to such benefices in the two Universities, according to the intention of the said laws—it is enacted "that every Papist or person making profession of the Popish religion, and every child, not being a protestant, under the age of one and twenty years, of every such Papist or person professing the Popish religion, and every mortgagee, trustee, or person any ways intrusted, directly or indirectly, mediately or immediately, by or for any such Papist or person making profession of the Popish religion, or such child as aforesaid, whether such trust be declared by writing or not, shall, from and after the 10th July, 1714, be disabled, and is thereby made incapable to present, collate, or nominate to any benefice, prebend, or ecclesiastical living, school, hospital, or donative, or to grant any avoidance of any benefice, prebend, or ecclesiastical living; and that every such presentation, collation, nomination, and grant, and every admission, institution, and induction to be made thereupon, shall be utterly void and of no effect, to all intents, constructions, and purposes whatsoever; and that, in every such case, the Chancellor and scholars of the University of Oxford, and the Chancellor and scholars of the University of Cambridge, by what name or names soever they or either of them are incorporated, shall respectively have the presentation, nomination, collation, and donation of and to every such benefice, prebend, or ecclesiastical living, school, hospital, and donative, set, lying, and being in the respective counties, cities, and other places and limits in the said act of the third year of King James mentioned, as in and by the said act is directed and appointed in the case of a Popish recusant convict."

The interest of the Roman Catholic co-patron vested in the University of Oxford.

The first question, therefore, is, whether, by virtue of these statutes, the interest of Mr. Knight did not pass to and vest in the University of Oxford. It may be contended on the other side that the statutes were intended to apply only to the case of a Roman Catholic patron *sole* seised of the advowson. But there is nothing in either of the

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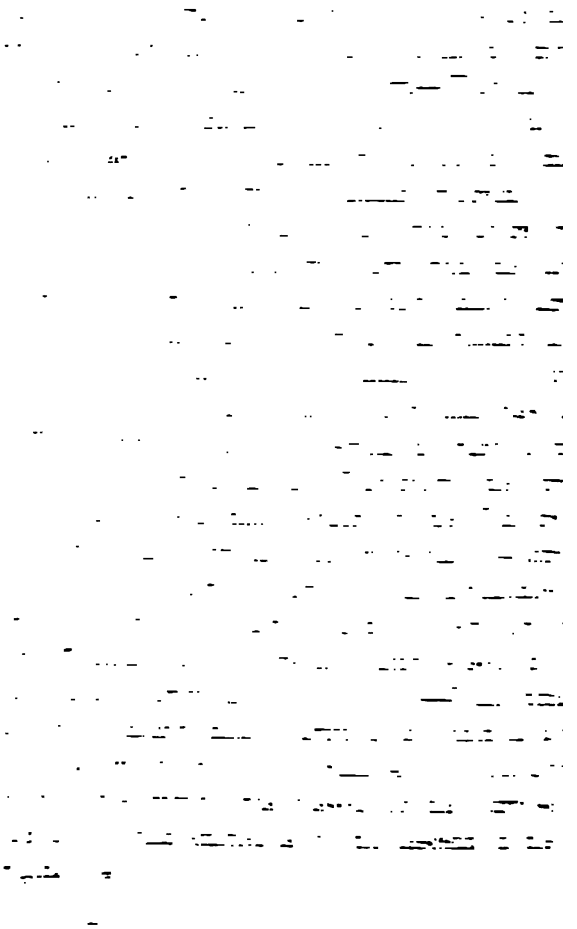
acts to justify so limited a construction: the legislature has used the same words in creating the disability as in transferring the patronage; therefore, if the disability created by the 12 Anne, st. 2, c. 14, s. 1, exists in this case, the right to present is clearly in the University. There can be no inconvenience or incongruity in holding that an advowson may pass to an individual and a corporation as tenants in common. Many analogous cases will readily suggest themselves; for example, on the bankruptcy of one of two partners, the rights of property or of action belonging to the firm do not pass to the solvent partner alone, but to the solvent partner jointly with the assignees of the bankrupt partner. [*Tindal*, C. J.—No doubt an *advowson* may vest in an individual and a corporation as tenants in common: but that a *right of presentation*, in the case of a vacancy at the time of the bankruptcy, would pass to the assignees, is not so clear: the point was very much discussed in the case of *Rennell* v. *The Bishop of Lincoln*, 11 Moore, 139, 3 Bing. 223.] That which has no value in the eye of the law undoubtedly does not pass to assignees, but remains in the bankrupt.

2. If one of two tenants in common present alone, the bishop may refuse to admit.

2. That the bishop is not *bound* to admit on the presentation of one of two tenants in common, is clear. In Co. Litt. 186. b., it is said, that, "if one joint-tenant or tenant in common present, or if they present severally, the ordinary may either admit or refuse to admit such a presentee, unless they join in presentation, and after the six months he may in that case present by lapse." The same doctrine will also be found in Watson, p. 66, Comyns's Digest, *Esglise* (H. 3.), Cruise's Digest, *Advowsons*, tit. 21, c. 2, s. 35, Viner's Abridgment, *Presentation* (G. a), Burn's Ecclesiastical Law, 8th edit. *Benefice*, p. 138, s. 4, and Doctor & Student, c. 30, p. 239: all these books treat the subject at considerable length; but in none of them is any trace to be found of a sole right to present being claimed by one of two or more tenants in common. In *The Chan-*



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James Manning, contrà.—Bracton, 249 a., s. 4, has a writ in the following form:—"Rex tali episcopo salutè. Sciatis q cùm A. sumonitus esset in curia nostra coram &c. ad respondendum B. & C. uxori suæ quare impedivit eos præsentare idoneã personã ad ecclesiam talem, quæ vacat, et cujus ecclesiæ advocationis ipsi B. & C. petũt duas partes. Idẽ A. venit in eadem curia nostra, et dixit q justè impedivit, quia jus p̃sentandi ad tertiam p̱tem p̱tinet ad ipsum, eo q p̱ticeps est prædictorum B. & C. Adjecit etiam q nunquam in clericum quẽ ipsi B. & C. præsentaverant consentiret, eo q ipse minus idoneus fuit ut dicebat, in aliũ tamen à primo ab eisdem B. & C. præsentatũ (dũ tamen idoneus esset) consentiret. Et ideò vobis mandamus q si prædicti B. & C. in unà personà idoneà consenserint: et illã vobis simul cum prædicto A. coñuniter præsentaverit, tunc ad præsentationẽ eorũ omnium, p̱sonã illã ad eandem ecclesiam admittatis. Si autẽ in p̱sonã talem idem A. consentire noluerit ut cõvenit, tunc (non obstante reclamatione ipsius A.) ad præsentationẽ ipsorũ B. & C. idoneam personã quã ipsi elegerint, ad eandẽ ecclesiam admittitis. Teste &c." [*Tindal*, C. J.—That doctrine is not recognized at the present day.] Where the presentation is made by one of two persons who are jointly entitled to present, the presumption is that the party whose assent is wanting *dissents*; and in that case, it may be conceded, the bishop may refuse to admit—Termes de la Ley, *Presentment*; Doctor & Student, c. 30, p. 239: but that does not apply to the case of one of two co-patrons being *disabled*. The statutes that have already been refer-

Sole right of presentation vested in the plaintiff, the co-tenant being disabled.

Effect of the statutes.

that thereupon every one shall be taken and adjudged to be seised of his or her separate part of the advowson to present in his or her turn; as, if there be two, and they make such partition, each shall be said to be seised, the one of the one moiety, to present in the first turn, the other of the other moiety, to present in the second turn; in like manner, if there be three, four, or more, every one shall be said to be seised of his or her part, and to present in his or her turn."

[illegible]

[illegible]

[illegible]

that statute have since been incorporated in the same clause in the statute of 12 Anne, st. 2, c. 14.] The 1st section of the 12 Anne, after creating the disability, and providing for the rights of the University, concludes with these words—" as in and by the said act is directed and appointed in the case of a Popish recusant convict." It could not have been intended to make the profession of the Roman Catholic religion more penal than a conviction of recusancy. The provision applying in its nature only to a private body, is not to be judicially noticed; and it is immaterial that it is found in the clause creating the disability.

Penal statutes not to be extended by equity.

It is a clear and indisputable rule of construction, that penal statutes are not to be extended by equity. The rule is thus laid down with reference to the 3 Jac. 1, c. 5, in Vaughan, 373, and in Cawley's Law of Recusants, edit. 1680, pp. 221, 227; and with respect to the 1 Edw. 2, st. 2, de frangentibus prisonam, in *Reniger* v. *Fogossa*, Plowd. 13. a.—the statute of Westminster 2, c. 3, in *Wimbush* v. *Tailbois*, Plowd. 57. a.—the statutes De Prærogativa Regis, c. 1, of Marlbridge, c. 4, of Gloucester, c. 1, and of Westminster 2, c. 48, in *Stradling* v. *Morgan*, Plowd. 204, 205—the 25 Edw. 3, c. 16, in *Fulmerston* v. *Steward*, Plowd. 109. a.—the 4 Hen. 7, c. 24, in *Stowel* v. *Lord Zouch*, Plowd. 366—the 11 Hen. 7, c. 20, in *Eyston* v. *Studd*, Plowd. 464—the 32 Hen. 8, c. 9, in *Partridge* v. *Strange*. Plowd. 78—the 35 Hen. 8, c. 1, in *Willion* v. *Berkley*, Plowd. 231—the 2 & 3 Edw. 6, c. 1, in *Wiseman* v. *Cotton*, 1 Lev. 79—the 17 Car. 2, c. 3, in *The King* v. *The Archbishop of Armagh*, 8 Mod. 6—the 3 Jac. 1, c. 8, in *Hammond* v. *Webb*, 10 Mod. 282; and generally, in *Wroth* v. *The Countess of Sussex*, 3 Leon. 133; *Poole* v. *Neel*, 2 Sid. 63; *Rawson* v. *Bargue*, Style, 81; Carter, 136; 2 Inst. 112; Brooke's Abridgment, *Parliament & Statutes*, pl. 31, 72. These several authorities shew that penal statutes are not to be extended by equity, even as against those upon whom they are especially intended

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to operate. And, that the 3 Jac. 1, c. 5, is highly penal, cannot be doubted—see Butler's note 346 to Co. Litt. 391. a. If the argument on the other side be correct, these amongst other penal consequences will ensue to the protestant co-patron: if he can make no presentment without the University being a party to it, one having another benefice already could not be presented—3 Jac. 1, c. 5, s. 21, 1 W. & M. c. 26, s. 5; and the non-residence of the incumbent for more than sixty days in any one year, would avoid the benefice—1 W. & M. c. 26, s. 6. So that the statutes would thus receive a collateral penal effect that never could have been contemplated by the legislature.

The 3 Jac. 1, c. 5, a penal act.

The statute of James speaks only of the case of *a patron* of a benefice &c. being a Popish recusant convict; and there is no reason why it should be extended to the case of *one* of *two* co-patrons professing the Roman Catholic religion. "Acts of parliament are to be so construed as no man that is innocent or free from injury or wrong be by a literal construction punished or endamaged"—Co. Litt. 360. a.; *Lincoln College* Case, 3 Rep. 59. b. "Patron" and "person seised" are convertible terms: and it is a clear rule of law, that, where in pleading a party is alleged to be seised, the law implies a *sole* seisin. In Comyns's Digest, *Pleader* (G. 2.), it is said, that, "If the plaintiff alleges a seisin in

The 3 Jac. 1, c. 5, not applicable to a case like this.

A general allegation of seisin imports in law a sole seisin.

[redacted]

entitled to recover against the defendant, and that such admission does not preclude the defendant from shewing that he is tenant in common with the plaintiff.] That case was decided without reference to the distinction of real property and a chattel interest. That the latter only was in the contemplation of the court is clear from the judgment, in which Parke, B., says: "That an undivided property in *a chattel* is a sufficient title to maintain trover against a stranger who has wrongfully dealt with it as his own, or against another tenant in common, who has destroyed it, does not admit of a question." That case therefore is no authority upon the point now before the court. The language of the enactment does not extend to the case of two or more patrons seised as joint-tenants, tenants in common, or co-parceners. [*Tindal*, C. J.—Then the case of two or more Roman Catholic co-patrons is not provided for by the statutes?] It is not necessary to carry the argument to that extent: the whole would constitute *one* patron. [*Tindal*, C. J.—How can they be less one because they profess different religious tenets?] It is not necessary to contend for that position.

Partition.

With respect to the suggestion that any hardship upon the protestant co-patron would be obviated by a partition—it is enough to say that partition might impose an additional burthen on the parties: this may be an advowson appendant, and not in gross (141).

Reply.

Kelly, in reply.—Assuming that a general allegation that a party is seised implies in law a *sole* seisin, how does the doctrine apply here? With regard to the 3 Jac. 1, c. 5, it is at least doubtful whether two or more jointly entitled to present would not constitute one patron, as two may jointly constitute one heir. But the disqualification of Knight does not arise upon that statute, but upon the 12

(141) The count states it to be an advowson *in gross*.

[illegible] 2, c. 14, which nowhere uses the term "patron;" [illegible] embraces, without exception, *every* person and *every* [illegible] and enables the Universities to do in all cases that [illegible] but for the disabling statutes, the Roman Catholic patron might have done. No authority has been cited to shew that the right of the Roman Catholic co-patron is vested in the protestant: and the court will not be astute to discover grounds for defeating the intention of the statute. Whether or not the right of presentation vested in the University, the *sole* right clearly was not in the plaintiff, and therefore the bishop was not bound to admit upon a presentation by her alone. And, in collating as he has done, the ordinary has done no more than his duty.

Cur. adv. vult.

Statement of the pleadings.

TINDAL, C. J., now delivered the judgment of the court:—The first count of the declaration in this case, after shewing by the deduction of title, that, at the time of the last avoidance, the plaintiff and one William Knight were seised of the advowson therein mentioned as of fee and right in equal moieties, proceeds to allege that the church became vacant by the death of the last incumbent, "by reason whereof, and because the said William Knight, at the time when the said last-mentioned church so became vacant as last aforesaid, was and from thence continually has been and still is a person professing the Roman Catholic religion, it did and doth belong to the plaintiff to present a fit person to the said last-mentioned church at this vacancy;" and then avers the disturbance of the plaintiff's right to present by the defendants.

The two defendants, viz. the ordinary and the clerk collated by him, join in pleading; and, in their plea to this count, justify the refusal of the ordinary to admit or institute the clerk who had been presented by the plaintiff, and the rejection of such presentation, "because the said William Knight had not joined nor in any manner concurred

in the said presentation, and that he the bishop on that occasion declared and assigned his reason and ground for so declining and refusing to accept, and for so rejecting such presentation, to be, the neglect and omission of the said William Knight to concur or join in the said presentation." And, after proceeding to state the collation to the said church of the defendant Todd, the plea alleges "that no notice whatever was given to the said bishop until long after the right of collating the said church so vacant to the defendant Todd had devolved to the said bishop as such ordinary:" upon which latter allegation the plaintiff in his replication takes a precise issue in the terms of the plea, alleging "that notice had been given to the bishop before any right of collating the said church so vacant to the other defendant had devolved to him;" to which replication the defendants demur. And, so far as relates to the replication, we can see no objection in point of form to the issue taken by the plaintiff. The defendants have rested their justification on the ground of the absence of notice that Knight was a Roman Catholic before the lapse incurred. If it was incumbent on the plaintiff to have given such notice at the time of the presentation of his clerk (for which, however, we can see no reason or authority), the defendants themselves should have alleged and relied upon the absence of such notice in their plea. But they have not so done; and the plaintiff has only followed the defendants in denying their allegation as it stands, as he the plaintiff had a right to do. But the objection to the replication has been, in effect, abandoned; and the argument on the part of the defendants has been entirely confined to the insufficiency of the plaintiff's title to present, as set forth in the declaration; the objection amounting simply to this, that the presentation was made by the plaintiff alone, whereas at the time of the presentation there was, as it is contended, a tenant in common of such right of presentation with the plaintiff, who ought to have joined

Issue well taken.

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with him, and that, by reason of such tenant in common not joining, a lapse incurred.

Question.

The point at issue between the parties, therefore, comes to this—whether the right of presentation is given to the Universities by the statutes 3 Jac. 1, c. 5, 1 W. & M. c. 26, and 12 Anne, st. 2, c. 14, in the case of the disability of one co-patron only out of many; or whether it is so given only in the case where a sole patron, or all who have the right of patronage is or are disabled by professing the Roman Catholic religion.

Object of the statutes attained by simply disabling the Roman Catholic co-patron.

The first observation that arises, is, that, as the words of the disabling clause in the statute of James are general, clearly extending to and comprising every person that is a Popish recusant convict, that is, as enlarged and explained by the subsequent statutes, every person professing the Roman Catholic religion, it follows that all which was intended to be effected by the legislature is completely accomplished, where there are several joint tenants or tenants in common of the right of patronage, by holding the statute in those cases to effect no more than the simple disability of all the co-patrons who are Roman Catholics: for, if the right of presentation, by the operation of the disabling clause, becomes limited to the protestant co-patrons only, the avoidance of any Popish bias or influence in the selection of an incumbent, which is the real object of the statutes, is attained as completely as if the right of presentation as to the share or portion of the Roman Catholic co-patron is given over to the Universities. There is, therefore, no necessity, in order to effectuate the object of the legislature, that the presentation in such case should be held to vest in the Universities: and the question becomes this, whether the words of the statute require that interpretation.

Distinction between the disabling clause and that conferring the right on the Universities.

And upon this point it appears to us there is a marked distinction between those words of the clauses which confer the presentation on the Universities, and those of the disabling clause. The clauses in the statute

of James which give the presentation to the Universities enact that the Universities shall have the presentation "when it shall happen to be void during such time *as the patron* thereof shall be and remain a recusant convict as aforesaid;" and, although these words are not repeated in the statutes of William & Mary and of Anne, still we consider them as virtually incorporated therein, as a direct reference is made in both of the latter statutes to the statute of James, and they are declared to have been passed in order to carry into effect the intention of the former law. And we cannot but think it will give full force and effect to this transferring or vesting clause of the statute, if it is considered as extending no further than to the case where the patron, if a sole patron, is a Roman Catholic, or where all the patrons, if there are several claiming under the same title, are of the same persuasion. And this observation is entitled to more weight when it is considered that the statute of James gives no interest, but a power only, to the Universities, as is observed by Hobart, C. J., in the case of *Duncombe* v. *The University of Oxford*, Winch's Rep. 11: and it is well established that the words creating a power must be strictly interpreted. And, undoubtedly, it will be found in all the cases and precedents which have occurred in courts of law, that the claim of the Universities has been made only where there has been a *sole* patron who was a recusant convict—see Winch's Entries 771; Lutwyche, 1100, in a Quare Impedit against the Chancellor &c. of the University of Cambridge; the case in Hobart, 126; and that in Winch's Rep. 11: and, so far as we have been able to search, no precedent is to be found of a claim by the University under a joint right to present with a protestant co-patron.

Statute 3 Jac. 1, c. 5, gives to the Universities a *power* only, not an *interest*.

Precedents of claims by the Universities.

But, still further, the interpretation contended for on the part of the defendants would work an injury to the patronage of the protestant co-patron; for, by section 5 of

The construction contended for by the defendants would

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the 1 W. & M. c. 26, the Chancellor and scholars shall not present or nominate any person who shall then have any other benefice with cure of souls, under pain of the presentation being utterly void. And, again, by section 6, it is enacted that no person so presented to any benefice with cure of souls shall be absent from the same above the space of sixty days in any one year, under the penalty that the benefice shall become void. And those two restrictions which are very properly placed upon the power of presentation when the University takes the whole, throw a burthen upon the right of presenting belonging to the protestant co-patron, which did not exist before. And, as there could be no possible reason for an enactment which should operate against the rights of a protestant co-patron, we think these clauses afford a key to the meaning of the statute, and shew the legislature had nothing in view beyond giving the power to the Universities to present, where by the recusancy of the patron or all the patrons under the same title, the whole power of presentation would devolve to them.

operate injuriously to the protestant co-patron.

Upon the whole, therefore, we think that the case of the transfer to the Universities of the power to present, when one or some only of the co-patrons are disabled, is either a casus omissus from the statute, and then we cannot extend the statute to comprehend it; or that the legislature designedly excluded it, and confined the vesting of the power of presentation in the Universities to a vesting of the entire right: in either of which cases, the judgment must be for the plaintiff. And by this construction no injury can be occasioned in any case to the ordinary, who at all times has a clear course to follow, perfectly free from all doubt, whereby he can never be treated as a disturber, viz. the admitting and instituting the presentee of the one protestant co-patron; for, according to Co. Litt. 186, b., "if one joint-tenant, or tenant in common, present severally,

Case of one of two co-patrons being a Roman Catholic, not within the statutes.

And this decision imposes no difficulty upon the ordinary.

the ordinary may either admit or refuse to admit such a presentee, unless they join in presentation, and after the six months he may in that case present by lapse."

Judgment for the plaintiff.

Monday, June 11th.

Quare Impedit is within the 3 & 4 Will. 4, c. 42, s. 34; but that clause is over-ridden by the proviso in the 5 & 6 Will. 4, c. 39, which enables the court, or the judge who tries the cause, to certify to exempt the defendants from costs.

Tenants in common of an advowson, one being a protestant, the other a Roman Catholic, the church being vacant, the former presented alone; the ordinary refused to admit the clerk so presented, on the ground that the *sole* right of presentation was not in the protestant co-patron, and, after a lapse, collated:— Held, that this was a proper case for a certificate under the 5 & 6 Will. 4, c. 39, to exempt the defendants from costs. And semble (dubitante Maule, J.) that the ordinary was, under the circumstances, an "ecclesiastical patron," within the meaning of the proviso in the last-mentioned statute.

Butt, for the defendants, applied for a certificate under the statute of 4 & 5 Will. 4, c. 39, which enacts, "that, in all writs and actions of Quare Impedit issued or brought from and after the passing of this act in England, Wales, or Ireland, where a verdict shall pass or be given for the plaintiff or plaintiffs in any such writ or action, the plaintiff or plaintiffs in every such writ or action, in addition to the damages to which he or they is or are by law now entitled, shall also have judgment to recover his or their full costs and charges against the defendant or defendants therein, to be assessed, taxed, and levied in such manner and form as costs in personal actions are now by law assessed, taxed, and levied; and where in any such writ or action the plaintiff or plaintiffs therein shall discontinue, or be nonsuited, or a verdict shall be had against him or them, that then the defendant or defendants in every such writ or action shall have judgment to recover his or their full costs and charges against the plaintiff or plaintiffs therein, to be assessed, taxed, and levied in manner aforesaid: Provided always, that *no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron, or incumbent, if the judge who shall try the cause, or, if there shall be no trial by a jury, the court in which judgment shall be given, shall certify that such archbishop, bishop, or other ecclesiastical patron, or incumbent, had probable cause for*

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defending such action; but, in no case, when the defence to any such action shall be grounded upon a presentation or presentations, collation or collations previously made to any benefice, shall such presentation or presentations, collation or collations, be deemed or considered probable cause for defending such action." The certificate having been granted—

Wednesday, June 12th.

James Manning, on a subsequent day, obtained a rule calling on the defendants to shew cause why the certificate so given should not be set aside.—He submitted that the affirmative words of the 4 & 5 Will. 4, c. 39, applied only to the case of a *trial,* the case of a *judgment on demurrer* being already provided for by the 3 & 4 Will. 4, c. 42, s. 34, which enacts, "that, where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined *in any action whatever,* the party in whose favour such judgment shall be given shall also have judgment to recover his costs in that behalf."

The 3 & 4 Will. 4, c. 42, s. 34, gives costs on demurrer *in all cases.*

Monday, Nov. 25th.

Kelly and *Butt,* in the following Michaelmas Term, shewed cause.—Before the statute 3 & 4 Will. 4, c. 42, it is clear that no costs were allowed in a Quare Impedit; and though the terms of the 34th section of that act are very general, it manifestly was not the intention of the legislature to include this species of action. The preamble of the 4 & 5 Will. 4, c. 39, is a legislative declaration to this effect—"Whereas the delay and expense of recovering advowsons and the rights of patronage and presentation to ecclesiastical benefices, by actions of Quare Impedit, are much increased by reason of *the defendants in such actions not being liable for the payment of costs,* and the true patrons are thereby frequently deterred from the prosecution of their just rights:" and the language of the enacting part, which is perfectly plain and unambiguous,

Quare Impedit not within the 3 & 4 Will. 4, c. 42, s. 34.

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was evidently expressly designed to meet a case not previously provided for. But, assuming that this description of action is within the 3 & 4 Will. 4, c. 42, s. 34, that clause and the 4 & 5 Will. 4, c. 39, must be read together; and then the proviso in the last-mentioned statute will override the whole. Then, this clearly is not a case in which it can be said that the defence set up was devoid of probable cause, seeing that the question was one upon which the court entertained doubt, and which they thought deserving of full consideration. And the case does not fall within the last branch of the proviso in the 4 & 5 Will. 4, c. 39, the defence resting upon a supposed want of title in the plaintiff to present.

Proviso in the 4 & 5 Will. 4, c. 39, overrides both statutes.

As to probable cause.

Manning, in support of the rule.—This is not a case in which the court had jurisdiction to grant the certificate that has been obtained; and, if it were, the circumstances would not warrant the exercise of a discretion in favour of the defendants. It has been said, that, prior to the 3 & 4 Will. 4, c. 42, no costs were allowed in Quare Impedit. That, however, is not so: the 8 & 9 Will. 3, c. 11, s. 2, enacted, "that, if at any time from and after the 25th March, 1797, any person or persons should commence or prosecute, in any court of record, *any* action, plaint, or suit, wherein upon any demurrer either by plaintiff or defendant, *demandant or tenant*, judgment shall be given by the court against such plaintiff or *demandant*, or if at any time after judgment given for the defendant in any such action, plaint, or suit, the plaintiff or *demandant* shall sue any writ or writs of error to annul the said judgment, and the said judgment shall be afterwards affirmed to be good, or the said writ of error shall be discontinued, or the plaintiff shall be nonsuit therein, the defendant or *tenant* in every such action, plaint, suit, or writ of error, shall have judgment to recover his costs against every such plaintiff or plaintiffs, *demandant or demandants*, and have execution for the same by capias ad satisfaciendum, fieri facias, or

No jurisdiction in the court to grant a certificate.

8 & 9 Will. 3, c. 11, s. 2.

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elegit." [*Erskine*, J.—It was expressly decided, in *Thrale* v. *The Bishop of London*, 1 H. Blac. 530, upon the authority of several cases there referred to by Lord Loughborough, that, though the defendant had judgment on demurrer in Quare Impedit, he was not entitled to costs under the statute 8 & 9 Will. 3, c. 11: and see *Wyndowe* v. *The Bishop of Carlisle*, 11 Moore, 269, 3 Bing. 404.] That the case is within the 3 & 4 Will. 4, c. 42, s. 34, is perfectly clear: no language could be more comprehensive. And it is equally clear that the 4 & 5 Will. 4, c. 39, does not apply to the case of a collation by lapse, where the bishop is a special disturber. Here, the bishop is not in the position of one bonâ fide contesting as a stakeholder: he claims a benefit for himself. The words of the 3 & 4 Will. 4, c. 42, s. 34, are as wide as those of the 43 Eliz. c. 6, s. 2, and the 22 & 23 Car. 2, c. 9, s. 136.

5 & 6 Will. 4, c. 39, not applicable to the case of a collation by lapse.

1. Quare impedit within the 3 & 4 Will. 4, c. 42, s. 34.

TINDAL, C. J.—The 3 & 4 Will. 4, c. 42, s. 34, enacts, "that, where judgment shall be given either for or against a plaintiff or demandant, or for or against a defendant or tenant, upon any demurrer joined *in any action whatever*, the party in whose favour such judgment shall be given shall have judgment to recover his costs in that behalf." It appears to me to be quite clear that Quare Impedit is included within that enactment. Then comes the 4 & 5 Will. 4, c. 39, intituled "An act to *give* costs in Quare Impedit," the preamble of which certainly assumes that defendants in actions of this description were not before liable to costs. In the enacting part of this last-mentioned statute, costs are given to the plaintiff where he obtains a verdict, and to the defendant where *he* obtains a verdict or the plaintiff discontinues or is nonsuited. Then follows the proviso, upon which the question turns:—"Provided always, that no judgment for costs shall be had against any archbishop, bishop, or other ecclesiastical patron or incumbent, if the judge who shall try the cause, or, if there shall be no trial by a jury, the court in which judgment shall be given, shall certify that

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such archbishop, bishop, or other ecclesiastical patron or incumbent had probable cause for defending such action; but, in no case, when the defence to any such action shall be grounded upon a presentation or presentations, collation or collations previously made to any benefice, shall such presentation or presentations, collation or collations, be deemed or considered probable cause for defending such action." If this proviso comprehends the present case, then the question arises whether or not it applies to the earlier statute. It appears to me that the case does fall within the proviso, it being a case where judgment has been given without a trial by a jury; and that the proviso is not limited to the case of a verdict, but equally applies to the 3 & 4 Will. 4, c. 42, s. 34. There can be no valid reason why it should be so limited. There may be as much reasonable doubt in the mind of the bishop, and it is as just that he should be under the protection of the court where the judgment is pronounced on demurrer upon a difficult point of law, as in the case of a verdict upon a doubtful point of fact. Probable cause may as well be probable cause in law as in fact. It seems to me that the only proper way of construing the two statutes will be, by considering the 4 & 5 Will. 4, c. 39, to form part of the 3 & 4 Will. 4, c. 42, and the proviso as over-riding both. I am also of opinion that the last branch of the proviso is not applicable here: it applies only to the case of a defence grounded upon a previous presentation or collation; whereas the ground of defence here was the supposed want of title in the plaintiff to present. And, as to the probable cause, it seems to me that the bishop may very well be excused for entertaining doubt, when we considered the case to be so fraught with difficulty as to induce us long to doubt which way the judgment ought to be. For these reasons, I think the rule for setting aside the certificate ought to be discharged.

2. The proviso in the 4 & 5 Will. 4, c. 39, over-rides both statutes.

3. The defence not grounded upon a previous presentation or collation, but upon supposed want of title in the plaintiff.

4. There was probable cause for the defence.

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BOSANQUET, J.—I am of the same opinion. The 3 & 4 Will. 4, c. 42, s. 34, and the 4 & 5 Will. 4, c. 39, are to be construed together: the first provides for costs in the case of a judgment upon "any *demurrer* joined *in any action whatever*;" the second, for costs in actions of Quare Impedit, where either party obtains a *verdict*, or where the plaintiff shall *discontinue* or be *nonsuited*: and then comes the proviso, which, taking up both cases, declares that no judgment for costs shall be had against any archbishop, bishop, &c., if the judge who shall try the cause, *or*, if there shall be no trial by a jury, *the court in which judgment shall be given*, shall certify that such archbishop, bishop, &c., had probable cause for defending such action. The certificate is in the one case to be given by the judge who presides at the trial, in the other by the court; which latter can only be understood as applying to the case of a judgment on demurrer provided for by the 3 & 4 Will. 4, c. 42, s. 34, and the former to the case of a verdict, discontinuance, or nonsuit, provided for by the 4 & 5 Will. 4, c. 39. I am also of opinion that the certificate was properly granted. The defendant, the bishop, claimed a right to present by lapse; he is therefore an "ecclesiastical patron" within the words of the proviso. The defence was not founded on any presentation or collation, but upon a supposed want of title in the plaintiff. And, to shew that the defence was not without probable cause, it is enough for the court to recollect the host of authorities cited on the part of the plaintiff, and the length of time occupied, not only in the argument, but in the subsequent consideration of the case, which was certainly one of no ordinary difficulty.

As to the construction of the statutes.

The bishop an "ecclesiastical patron."

ERSKINE, J.—I am of the same opinion. Admitting that the action of Quare Impedit is within the 3 & 4 Will. 4, c. 42, s. 34, the question is, whether that section is not overridden by the proviso in the 4 & 5 Will. 4, c. 39. If the

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language of that proviso could be read so as to have reference only to the cases mentioned in the previous part of the section to which it is appended, I should have been inclined to hold that the latter statute must be construed without regard to the former one. But, inasmuch as the enacting part of the 4 & 5 Will. 4, c. 39, applies only to the cases of nonsuit, discontinuance, and verdict, and the proviso applies to something more, viz. to the case of a *judgment given by the court* (that is, a judgment on demurrer), it is necessary to extend its construction beyond the enactments of the particular statute. To what, then, can it properly be referred? Clearly to the 3 & 4 Will. 4, c. 42, s. 34, only. And, reading the proviso with reference to the last-mentioned enactment, I have no hesitation in saying that the court had authority to grant the certificate which has been granted in this case. I am also of opinion that the bishop may properly be considered as acting as an ecclesiastical patron. And I must confess that I think there was ample probable cause for the defence. Unless, therefore, the case is brought within the exception at the end of the proviso—that, in no case, when the defence to any such action shall be grounded upon a presentation or collation previously made to any benefice, shall such presentation or collation be deemed or considered probable cause for defending such action—the discretion of the court in granting the certificate has been properly exercised. Now, the ground of defence here was not any previous presentation or collation, but the want of title in the plaintiff to present. I therefore think the rule must be discharged.

The bishop an "ecclesiastical patron."

MAULE, J.—The action of Quare Impedit is clearly within the 3 & 4 Will. 4, c. 42, s. 34, giving costs to the successful party on a judgment "upon any *demurrer* joined *in any action whatever*." The 4 & 5 Will. 4, c. 39, gives costs to the plaintiff in one additional case, viz. in the case

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of a *verdict:* so that the effect of the two statutes is, th the plaintiff in a Quare Impedit is entitled to costs whe he obtains judgment on a demurrer, and also where obtains a verdict. The proviso, as I read it, applies to bo cases—"no judgment for costs shall be had against ar archbishop, bishop, or other ecclesiastical patron, or incu bent, if *the judge who shall try the cause, or,* if there sh be no trial by a jury, *the court in which judgment shall given,* shall certify that such archbishop, bishop, or oth ecclesiastical patron, or incumbent, had probable cause f defending such action; but, in no case, when the defen to any such action shall be grounded upon a presentati or presentations, collation or collations, previously made any benefice, shall such presentation or presentations, c lation or collations, be deemed or considered probab cause for defending such action." It is contended, on t part of the plaintiff, that this proviso is to be taken mere as an exception out of the statute in which it is foun But to that construction there is this insuperable difficult the words "if there shall be no trial by a jury," shew th the plaintiff's right to costs is an existing right where the has been no trial by a jury; but those words would ha no application at all unless they were held to have refe ence to the only other case in which a plaintiff could ha costs, viz. the case of a judgment on demurrer. If this a case in which a certificate may be given, then it is f the court to consider whether or not there was probab cause for defending the action; and in this they must confined to the record, and cannot properly look to ar affidavits. As to whether or not the case falls within t last branch of the proviso, though I concur with the re of the court, yet I entertain some doubt whether the bish claiming to present by lapse, is to be considered as "ecclesiastical patron." Upon the whole, however, I am opinion that the certificate has been properly granted, ar

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therefore that the rule for setting it aside must be discharged.

Rule discharged (142).

(142) It certainly seems somewhat strange to hold that the legislature *intended* the proviso in the 4 & 5 Will. 4, c. 39, to apply to a prior enactment, of the *existence*, or, at least, of the *effect* of which they, in the preamble to that statute, solemnly protest their *total ignorance*.

EMMETT *v.* KEARNS.

Saturday, May 25th.

One W. being indebted to the plaintiff, who was pressing for a settlement, the defendant, W.'s attorney, sent the plaintiff W.'s acceptance at two months' date, inclosed in a letter in which he desired the plaintiff to put his name to the bill as drawer, and told him he might safely pay it away. Upon being asked to indorse the bill, the defendant wrote on the back of the letter in which he had inclosed the bill—"I never put my name to bills: but I will see it paid for W.:"—Held, that this was a personal undertaking, upon sufficient consideration, to pay W.'s debt.

THIS was an action of assumpsit upon a guarantie. The declaration stated, in substance, that one Walsh being indebted to the plaintiff in the sum of 23*l.* 10*s.*, the defendant, in consideration that the plaintiff would take by way of payment a bill at two months accepted by Walsh, and would forbear to proceed for the recovery of the debt in the meantime, undertook and promised to guarantee the due payment of the bill; that the bill was dishonored; and that Walsh and the defendant refused to pay the amount.

The material plea was, that there was no sufficient note in writing of the defendant's promise, to satisfy the statute of frauds; whereupon issue was joined.

The cause was tried before Tindal, C. J., at the sittings at Westminster after the last term. It appeared that Major Walsh was indebted to the plaintiff in the sum above mentioned, for the hire of a cabriolet; and that, Major Walsh being about to go abroad, and the plaintiff being urgent for the settlement of his demand, the defendant, who was Major Walsh's attorney and agent, sent the plaintiff the Major's acceptance at two months for the amount, inclosed in the following letter:—

"Red Lion Square, 24th March, 1838.

"Major Walsh being again disappointed in receiving remittances, and you expressing yourself inconvenienced for

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money, I inclose you his acceptance, payable here, at two months. You may put your name as drawer, and safely pay it away. "W. M. Kearns."

The plaintiff declining to take the bill unless the defendant would indorse it, the defendant wrote on the back of the above letter—"I never put my name to bills: respectable professional men should not: but I will see it paid for Major Walsh. W. M. K."

The bill was duly presented, and dishonored.

On the part of the defendant, it was submitted, that the above was not a personal undertaking by the defendant to pay the bill out of his own funds, and that, even if it were, there was no consideration for the promise upon the face of the guarantie so as to satisfy the statute of frauds; and therefore that the plaintiff ought to be nonsuited.

His lordship, however, declined to nonsuit, and the jury returned a verdict for the plaintiff.

Andrews, Serjeant, now moved that this verdict might be set aside, and a nonsuit entered, or a new trial had.—He submitted, that, to satisfy the statute, the guarantie must upon the face of it exhibit all the essential parts of an agreement; that here there was no consideration, either express or implied, for the defendant's promise, and no contract binding the plaintiff to forbearance at the time the guarantie was given.

TINDAL, C. J.—I see no reason for disturbing the verdict in this case. It appeared that Major Walsh owed the plaintiff 23*l.* 10*s.*, that the plaintiff was pressing for the settlement of this debt, and that Major Walsh was about to quit the country. This being the state of affairs, the defendant obtained from the Major an acceptance at two months, and sent it to the plaintiff inclosed in a letter in which he told the plaintiff that he might put his name to

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the bill as drawer, and might safely pay it away; and he afterwards undertook "to see the bill paid for Major Walsh." What room is there here for fraud or perjury? Putting the letter and the indorsement together, it seems to me that an ample consideration is necessarily to be implied: for, the moment the plaintiff put his name to the bill as drawer, he bound himself to forbear for the two months.

BOSANQUET, J.—I am also of opinion that enough of consideration appears upon the face of this guarantie. The debt was already due, and, in consideration of the plaintiff's taking a bill at two months' date, the defendant undertook to see it paid.

The rest of the court concurring—

Rule refused.

DOE *d.* BRACEBRIDGE *v.* ROE.

Saturday, May 25th.

The court refused to allow the sticking up a declaration and notice on premises the tenant whereof had absconded, and it was unknown whether or not there was property thereon upon which a distress might be made, to be deemed good service.

JOHN BAYLEY moved that the service of a declaration and notice in ejectment might under the special circumstances be deemed good service. The premises consisted of three houses, situate in Margaret Street, Clerkenwell, of which one White entered into the occupation as tenant in January last. Six months' rent was due, the premises were shut up and appeared to be abandoned, and the landlord had no means of ascertaining whether or not there was any property upon the premises whereon a distress could be levied. Copies of the declaration and notice had been affixed upon the premises.

TINDAL, C. J.—I think we cannot help you without laying it down as a general rule, that, in all cases where premises are shut up, so that the landlord cannot have

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access to them in order to see whether or not there is any sufficient distress, and he is therefore unable to proceed under the statute 11 Geo. 2, c. 19, as upon a vacant possession, the mere sticking up a declaration and notice upon the premises will enable him to proceed as in the case of an ordinary service. This would in effect be to repeal the statute altogether.

The rest of the court concurring—

Rule refused.

Monday, May 27th.

Two of the personal representatives of a deceased tenant from year to year signed a memorandum to the following effect:—"We, the undersigned executrixes, &c., do hereby renounce and disclaim, and also surrender and yield up, unto the

DOE *d.* WYATT *v.* STAGG.

THIS was an action of ejectment brought by the parish officers of St. Helen's, in the Isle of Wight.

At the trial before Parke, B., at the last Summer Assizes at Winchester, the following facts appeared in evidence:—The premises in question were in 1719 leased by the then parish officers of St. Helen's to one French for a term of ninety-nine years. The term created by this lease descended to one Stagg, who died leaving his widow and his daughter (the present defendant) in possession. The widow in 1790 married one John Cheverton, who resided

personal representatives of Cheverton, which they relied on as a disclaimer of title:—

"We, the undersigned executrixes, named and appointed in and by the last will and testament of John Cheverton, late of the parish of St. Helen's, in the Isle of Wight and county of Southampton, husbandman, deceased, dated the 15th day of February, 1824, and who have duly proved the same in the Registry Court of the Bishop of Winchester, and taken upon ourselves the execution thereof, do hereby *renounce and disclaim*, and also *surrender and yield up* unto the churchwardens and overseers for the time being of the said parish of St. Helen's, all right, title, interest, use, trust, term and terms of years whatsoever, and possession of and in all that messuage or tenement and premises called Belcroft, situate in the parish of St. Helen's, formerly in the possession of the said John Cheverton as tenant thereof to the said parish of St. Helen's. Witness our hands this 21st day of May, 1838.

"Harriet Wickens,
"Matthew Wickens,
(Husband to the above)
"F. M. Cheverton."

On the part of the defendant it was contended that the above instrument was a surrender, and not a disclaimer, and therefore ought to have been stamped—55 Geo. 3, c. 184, Sched. part 1, tit. *Surrender;* and that without it there was no evidence of Cheverton's tenancy having been determined.

The learned Baron was of opinion that the above instrument was admissible in evidence as a *disclaimer:* and he left it to the jury to say whether or not Cheverton's term had been duly put an end to. They found that it had not: and a verdict was thereupon taken for the plaintiff, subject to a motion to enter a nonsuit, if the court should be of opinion that the paper was improperly admitted.

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Doe d. Williams v. Smith.

Erle, J. Memorandum Term last, enlarged as rule nisi accordingly.

Crowder and *G. Moore* now shewed cause.—The memorandum in question did not amount to a surrender: and the use of the word 'surrender' will not prevent it from operating according to its legal effect, as a disclaimer. A disclaimer is not necessarily made by deed: in the case of a tenancy from year to year, a disclaimer, which is a mere waiver of the tenant's right to notice to quit, or a repudiation of the landlord's title, may be by parol. A claim set up by the tenant inconsistent with his landlord's title, has been held to be a disclaimer. Thus in *Doe* d. *Cadwel* v. *Fennell*, 1 M. & P. 687, 4 Bing. 387, the defendant held premises under a tenant for life, on whose death possession was claimed and rent demanded by the heir-at-law of the devisor: whereupon the defendant wrote to the attorney of the heir-at-law, stating that he held as tenant to Smallpiece the husband of the tenant for life in right of his wife; that he had never considered the claimant as the landlord of the house: that he should be ready to pay the arrears to any person who should be proved to be heir-at-law; but that he must decline taking upon himself to decide upon the claim made, without more satisfactory proof in a legal manner: and it was held that this amounted to a disclaimer of the title of the heir-at-law, and that he might maintain an ejectment against the tenant without giving him a notice to quit. Best, C. J., there said: "When the lessor of the plaintiff demands his rent, the defendant says, 'I will not pay; I am tenant to Smallpiece;' and at the trial he puts the lessor of the plaintiff to prove his title. If this be not disclaimer, what is? But I should not have thought differently even if this case had been exactly like the case of *Doe* d. *Williams* v. *Pasquali*, Peake, 196, because a notice to quit is only requisite where a tenancy is admitted on both sides, and,

if a defendant denies the tenancy, there can be no necessity for a notice to end that which he says has no existence." Executors cannot *surrender*, without an actual entry—Williams's Executors, 434: but they may *disclaim*—Shep. Touchst. 452. At all events, should the court be of opinion that the document in question was not admissible in evidence, for want of a stamp, they will not make the rule absolute in its present form; for, independently of that, the jury ought from the evidence to have presumed a surrender. *Leigh* v. *Thornton*, 1 B. & Ald. 625, is exactly in point: it was there held that the statute of limitations is a good defence to an action by a landlord for rent against one who had been once his tenant from year to year, but who had not within the last six years occupied the premises, paid rent, or done any act from which a tenancy could be inferred, although the tenancy had not been determined by a notice to quit.

Erle and *Butt*, in support of the rule.—The jury having found that the tenancy had not been put an end to, no question of presumption can arise here. The production of the memorandum was essential to plaintiff's case; and, for whatever purpose it was produced, its legal operation was that of a surrender, and not a disclaimer. A disclaimer is a denial by a tenant of the landlord's title, and operates as a forfeiture—*Doe* d. *Ellerbrock* v. *Flynn*, 1 C. M. & R. 137. But a surrender is a renunciation of a party's own title. The instrument in question being capable of being made available as a surrender, must be so construed: *Parmeter* v. *Webber*, 2 Moore, 656; *Corder* v. *Drakeford*, 3 Taunt. 382. In *Williams* v. *Sawyer*, 3 B. & P. 70, 6 Moore, 226, it was held that an agreement (dated October 27, 1819, and stamped with a 20*s.* stamp) between landlord and tenant, that the landlord should have immediate possession (except as was mentioned) of a farm, lands, and premises which had been occupied by the tenant for a

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term, the landlord to take the stock, and the tenant to take over half the manure, half the straw, the hay, and an allowance of land to have the same use of the land with the landlord as incoming tenant till the 25th January following, without rent, &c. was properly rejected, on the ground that it operated as a surrender of the term, and therefore required a deed stamp under the 33 Geo. 3, c. 14s. Imperial part 1. But there is no difference in this respect between a term of years and a tenancy from year to year.

TAYLOR, J. A.—I must confess I should have been very willing to construe the instrument as a simple memorandum of title, but looking at the whole scope of it, I cannot come to any other conclusion than that it is a surrender. In the first place, it is not executed by all the representatives of the deceased John Thornton. In the next place, it is in terms a surrender of an interest which the parties were claiming. I therefore think it was inadmissible for want of a deed stamp. But it seems to me that the justice of the case requires that there should be a new trial, on payment of costs by the lessee of the plaintiff.

CAMERON, J.—I am of the same opinion. To operate as a disclaimer, it must either be a denial of the landlord's title, or a refusal of an estate which the party is not bound to accept. An executor, however, does not stand in a situation to enable him to disclaim a term: it comes to him, not by any act of his own, but by operation of law. I am of opinion that we cannot give any effect at all to the document in question without holding it to be a surrender; in which case, the want of a stamp would afford an insuperable objection to its being received as evidence.

The rest of the court concurring—

Rule absolute for a new trial.

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Tuesday, May 28th.

FELTHAM *v.* CARTWRIGHT, MATTHEWS, and JONES.

TRESPASS against the three defendants for breaking and entering the plaintiff's dwelling-house on the 13th October, 1837, damaging fixtures, and taking away goods, &c.

The defendant Jones pleaded—not guilty—and leave and licence. The plaintiff joined issue on the first plea, and traversed the second. The other two defendants pleaded —not guilty—that the defendant was not possessed of the dwelling-house in the declaration mentioned—leave and licence—and a justification under a warrant to distrain for rent due to Cartwright. The plaintiff joined issue on the first two pleas, traversed the third, and to the fourth replied, new assigning, that the defendants stayed longer on the premises for the purpose of making the distress than the law allows: issue thereon.

The cause was tried before Lord Denman at the last Summer Assizes for the county of Surrey. The facts that appeared in evidence were as follow:—The plaintiff was a widow whose husband had been tenant of the premises in question under Mr. Cartwright, and died of typhus fever on the 2nd October, 1837. On the 13th, Cartwright distrained for 15*l.* arrears of rent due at the preceding Michaelmas, the yearly rent being 25*l.* The plaintiff was at this time confined to her bed, labouring under the same fever that had carried off her husband. A man (Matthews) was put in possession, and remained therein until the 18th; on which day Cartwright went into the room in which the plaintiff was lying, and persuaded her to put her mark to the following memorandum, which was produced at the trial in support of the issue as to the leave and licence:—

The defendant having distrained the goods of the plaintiff for arrears of rent, the latter signed the following undertaking:—"In consideration of Mr. C. giving me the household furniture distrained for rent due to him (but the furniture only), I undertake to give him possession of the premises held by my late husband, on or before one week from this date." At the expiration of the week (the plaintiff having in the mean time acted upon agreement by removing part of the furniture, and selling other part), the defendant and others entered took possession. In an action of trespass for such entry:—Held, that the above memorandum sustained a plea of leave and licence: and *semble*, that the licence was not revocable; or that, if it were so, no evidence of revocation could be given without being replied.

Held also, that the memorandum did not require a stamp, it not appearing affirmatively that it related to a matter amounting in value to 20*l.*

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PELTHAM v. CARTWRIGHT.

"In consideration of Mr. Cartwright giving me the household furniture distrained for rent due to him (but the furniture only), I undertake to give him possession of the premises held by my late husband, on or before one week from this date."

This memorandum was witnessed by the defendant Matthews.

On the part of the plaintiff it was objected that the above memorandum was not admissible in evidence, for want of a stamp. The objection was over-ruled.

During the week succeeding the execution of the memorandum, the new tenant was, with the consent of the plaintiff, let into possession of the garden attached to the house, and the plaintiff sold a portion of the furniture, and removed other part of it, but she refused at the expiration of the week to quit the premises: whereupon the defendant Jones who was Cartwright's attorney fastened up the lower part of the cottage, so as to prevent any person from having access to the apartment where the plaintiff lay, and filled her chimney with straw. The plaintiff was supplied with necessaries at her chamber window.

For the plaintiff, it was contended that the memorandum of the 18th October, though it might amount to an agreement, for a breach of which the plaintiff might be liable to an action, did not sustain the plea of leave and licence; and, further, that the circumstances under which it was extorted from the plaintiff amounted to duress. Lord Denman was of opinion that the plea of leave and licence was proved, and that there was ample consideration for it: and, subject to their opinion upon the facts, he directed the jury to find for the defendants upon that issue. The jury having found accordingly—

Platt, in Michaelmas Term last, moved for a new trial, on the ground of misdirection.—1. If the memorandum of the 18th October were operative at all, it operated to re-

lieve the plaintiff, not only from the 15*l.* arrears of rent (she having administered to the effects of her deceased husband), but also from the current quarter's rent—together, 21*l.* 5*s.*, and therefore required a stamp—55 Geo. 3, c. 184, Sched. part 1, *Agreement*—which imposes a duty upon every "agreement, or any minute or memorandum of an agreement, made in England under hand only, or made in Scotland without any clause of registration (and not otherwise charged in that schedule, nor expressly exempted from all stamp-duty), where the matter thereof shall be of the value of 20*l.* or upwards, whether the same shall be only evidence of a contract, or obligatory upon the parties from its being a written instrument." 2. The memorandum clearly did not support the plea of leave and licence.

TINDAL, C. J.—It does not affirmatively appear that the subject-matter of the agreement was of the value of 20*l.* or upwards: it would of necessity be limited by the value of the furniture which was given up under it; and that was not shewn. No rule, therefore, can be granted upon the first point: but the second seems worthy of further consideration.

A rule nisi having been granted accordingly—

Thesiger, *Ogle*, and *Locke*, now shewed cause.—The trespasses between the 13th and 18th October are covered by the justification, which is admitted by the new assignment. To those trespasses Jones was no party. There was nothing to affect him until the 25th: and the licence covered all the supposed trespasses committed after the 18th. Jones therefore was clearly entitled to an acquittal; for, the plaintiff could not proceed for the two sets of trespasses at the same time: and, the licence having been acted upon, it could not be revoked; or, if it could, it was not competent to the plaintiff to give evidence of a revocation without replying it.

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[illegible]

[illegible] in support of the rule.—[illegible] did not amount to a licence. It was a most extraordinary agreement, for a breach of which the plaintiff might have maintained himself issue in an action. And if it were in legal operation a licence, it was clearly revocable. Besides, to be available as an answer to the action, the licence should be co-existent with the trespasses as to which it is pleaded; and here a week was not mentioned.

TINDAL, C. J.—This is an action of trespass against three defendants, two of whom justify together, the third alone. The two former plead amongst other pleas a leave and licence covering all the trespasses complained of, and a further plea justifying the entering the plaintiff's house to distrain for rent: as to which latter plea the plaintiff new assigns a longer stay upon the premises than the law allows; to which there is a rejoinder of not guilty. That closes the record as to the defendants Cartwright and Matthews. The other defendant, Jones, pleads only not guilty, and leave and licence; and there the record stops as to him. It was open to the plaintiff at the trial either to go for the trespasses committed by the two first-named defendants, or for those committed jointly by the three. She chose the latter course, and the verdict is taken generally as to the three. It is important, therefore, to see when the joint trespasses by the three defendants were committed. It appears upon the evidence, that, on the 13th October, the two first-named defendants entered for the purpose of making a distress for rent due to Cartwright, the landlord, and on the 18th (the five days having expired) an agreement is entered into for a week's further time. Until the 25th the third defendant, Jones, never appeared. We must, therefore, take up the case from the 25th, when the three defendants are found acting together. The agreement of the 18th is as follows:—"In consideration of Mr. Cartwright, giving me [the plain-

tiff] the household furniture distrained for rent due to him (but the furniture only), I undertake to give him possession of the premises held by my late husband, on or before one week from this date." The agreement was acted upon by the plaintiff: she proceeded to remove part of the furniture, and to sell other part, and she allowed the new tenant to take possession of the garden. The question is whether this agreement operated as a licence to the three defendants from and after the 25th October, and whether it was revoked. The first question left by Lord Denman to the jury, was, whether or not the execution of the agreement was a voluntary act on the part of the plaintiff: the jury found that it was; and then his lordship told them that the agreement operated as a licence from the termination of the week therein mentioned. It has been said that the agreement, supposing it to be operative as a licence, was revocable. I am not prepared, however, to say that it could be revoked after the tenant had acted upon it, and taken under it that which was the stipulated price of the landlord's re-entry. But that question should, at all events, have been raised upon the record. I therefore think that the construction put by his lordship upon the agreement was correct, and the question properly left to the jury; and that the rule must be discharged.

VAUGHAN, J.—I am of the same opinion. The pleadings in this case are rather complicated; but in the result the question arises only upon the trespasses committed by the three defendants jointly after the 25th October, as to which the leave and licence is pleaded. The intention of the parties when the agreement (the consideration for which was undoubtedly a valuable one) was entered into evidently was, that the plaintiff's interest in the premises should cease on the 25th October. I think the question was properly left to the jury. And, as to the argument that the licence was revocable, it seems to

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me that there is no foundation for saying so after the agreement had been acted upon, and the plaintiff had taken all the benefit that was intended for her under it: and, if revocable, the revocation should at all events have been replied.

COLTMAN, J.—I am of the same opinion. The plaintiff not having abandoned the charge against Jones, the inquiry was limited to the trespasses committed by the three defendants on and subsequently to the 25th October. The simple question, therefore, is, whether the trespasses subsequently to the 25th were committed under a licence from the plaintiff. Strictly speaking, the memorandum of the 18th could not convey an interest; but it imports a licence to the party to act as if an interest did pass. And the licence being founded upon a good consideration, viz. the redemption of the plaintiff's goods from the distress, and having been acted upon, in my judgment was not revocable.

ERSKINE, J.—I am of the same opinion. The plaintiff had two distinct causes of action: she was at liberty to proceed either against Cartwright and Matthews for the trespasses committed by them between the 18th and 25th October, and suffer Jones to be acquitted; or to go against the three defendants for the trespasses committed by the three jointly on and after the last-mentioned day: she chose the latter course. The agreement of the 18th October was in substance a licence to Cartwright to resume the possession of the premises on the 25th; and therefore the plea of leave and licence was sustained.

Rule discharged.

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DOE *d.* KERR *v.* ROE.

Wednesday, May 29th.

A consent rule may be drawn up, where the tenant has appeared and pleaded, though no rule for judgment against the casual ejector has been obtained.

THE tenant in an action of ejectment having appeared and pleaded, though no rule had been obtained for judgment against the casual ejector, the officer objected to draw up a consent rule.

Barstow moved for a rule to shew cause why the rule should not be drawn up.—He submitted that, the tenant having done all that it is the object of the rule for judgment to compel him to do, there could be no reason why the consent rule should not be drawn up. He admitted that he could find no authority for such an application.

THE COURT granted a rule nisi, which was afterwards made absolute, no cause being shewn (143).

(143) See Doe d. Emeny v. Roe, post, p. 769.

PEARSON *v.* YEWENS.

Thursday, May 30th.

The defendant, being illegally in the custody of the sheriff, was detained at the suit of the plaintiff: the court ordered him to be discharged from that detainer; but the rule for this purpose

THE defendant was arrested by one Sloman, an officer of the sheriff of Middlesex, who at the time had no warrant from the sheriff; in order to give a false colour of legality to the caption, Sloman procured one Nathan, who had a warrant against the defendant at the suit of another plaintiff, to hand over that warrant to him, and the undersheriff altered the warrant by substituting the name of Sloman

was not served upon the Warden of the Fleet, whither he had been removed in execution at the plaintiff's suit. The defendant being in legal custody at the suit of another party, the plaintiff in this action lodged a fresh detainer against him, and brought him up to be charged in execution thereon. The Warden's return to the habeas corpus shewing the defendant to be already in execution at the plaintiff's suit:—Held, that he could not be charged again without first being discharged from the former illegal execution.

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for that of Nathan as the officer by whom it was to be executed. This court on a former occasion (ante, p. 435) held that the defendant was not in the lawful custody of Sloman, and that the sheriff having, by the alteration of the warrant, become a party to the illegal act of the officer, the defendant was not liable to be detained upon other writs then in the sheriff's hands. The rule was therefore made absolute for discharging the defendant from the custody of the Warden of the Fleet as to this action.

This rule was never served upon the Warden: it had been served upon the plaintiff; and he, without taking any step to discharge the defendant from custody as to the arrest so held to be illegal, lodged with the Warden a fresh detainer against him, the defendant being still a prisoner at the suit of another creditor (144).

(144) See Robinson v. Yewens, 5 M. & Welsby, 149. In that case, the court of Exchequer, professing to recognize the principle upon which this court held the arrest to be illegal and incapable of sustaining the detainer here, held that the defendant was not entitled to be discharged from the arrest itself—an arrest upon a warrant not directed to the officer who made it at the time of the arrest, but in which his name was inserted by the undersheriff *after the caption was effected!* The ground upon which that court so decided was, that the affidavit of the undersheriff rebutted the presumption of collusion on the part of the sheriff so as to make him a party to the original illegality committed by Sloman.

But, in Collins v. Yewens and Richards v. Yewens, 2 P & D. 439, 444, the court of Queen's Bench, under circumstances precisely similar, and having before them an affidavit of the undersheriff similar to that produced in the court of Exchequer, held that the original arrest was illegal, and the subsequent detainers founded thereon illegal also. In delivering the judgment of the court, Lord Denman says: "If we were to hold this arrest or detainer (for it does not appear which it is) good, we should be authorizing any sheriff's officer, without a warrant, to arrest any person against whom he fancied that writs were lodged in the office, and then to cure the illegality of his original arrest by procuring warrants on the writs so lodged—a speculation which cannot be endured."

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Gunning now sought to charge the defendant in execution upon the last-mentioned detainer.

The Warden's return to the habeas corpus stated that he had the defendant in custody at the suit of the plaintiff upon process issuing out of this court, and also at the suit of one Robinson upon process out of the court of Exchequer.

Wilde, Serjeant, shewed cause.—The ceremony of charging the defendant in execution at the suit of the present plaintiff is perfectly idle, seeing that he already stands so charged. It is true, this court has held such costody to be illegal, and directed the defendant to be discharged therefrom; but that rule has never been acted upon by the plaintiff, therefore the illegal custody continues. The plaintiff now comes to the court upon the footing that the defendant has been discharged from that custody: if he has, let him shew it. [*Vaughan*, J.—The Warden being supposed to be in attendance upon the court, was it necessary that he should be actually served with the rule?] The Warden receives the commands of the court as every other person does, viz. by rule.

Gunning, contrà.—The rule pronounced by this court in Easter Term last orders that the defendant be discharged from custody at the suit of the plaintiff in this action. Upon the service of that rule, the Warden would enter the defendant's discharge. The defendant, who was the party to benefit by it, should have served the rule.

TINDAL, C. J.—It appears to me that the return made by the Warden of the Fleet to the writ of habeas corpus upon which the defendant is now before us, affords an answer to the application to charge him in execution. By that return we find that the defendant is already charged

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in execution in this very suit. We know that we, on a former occasion, ordered his discharge: but the Warden is not informed of that. Before he came again to charge the defendant in execution, the plaintiff should have taken care that the rule pronounced by us in Easter Term last was served upon the Warden. As the court of Exchequer have, as we are informed, held the defendant to have been properly arrested in one of the actions, it will be easy for the plaintiff to correct his blunder, by now serving the rule.

VAUGHAN, J.—Had the plaintiff served the former rule upon the Warden, the defendant would not have appeared upon the return of the habeas corpus to have been detained already in execution at the suit of this plaintiff. As the matter stands at present, it would be a work of supererogation to charge the defendant again.

The rest of the Court concurring—

Rule refused (145).

(145) The objection having been cured, the defendant was on a subsubsequent day brought up again and charged in execution at the plaintiff's suit.

Thursday, May 30th.

DOE *v.* TRYE.

The plaintiff having sued out a ca. sa. against one H., her agent requested the undersheriff to direct the warrant thereon to an officer named by him, took the warrant, and himself delivered it to the officer, accompanied him to the house where H. was to be met with, and encouraged him to make the caption in an illegal manner. In an action against the sheriff for the escape of H. from this custody:—Held, that, under the circumstances, the officer was the special bailiff of the plaintiff, and that the sheriff was not liable for the escape.

DEBT against the sheriff of Gloucestershire for the escape of one Hale from custody under a capias ad satisfaciendum, for the costs of an action of ejectment in which

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one Anne Jenkins was the lessor of the plaintiff. The defendant pleaded nunquam indebitatus.

At the trial before Lord Abinger, C.B., at the last Summer Assizes at Gloucester, the following facts appeared in evidence:—One Roberts (who was himself the witness), an attorney at Gloucester, acting on behalf of Mrs. Jenkins's attornies, who resided in London, went to the sheriff's office, and requested that the warrant might be directed for execution to an officer named Price (who had before been employed by the London attornies), obtained from the undersheriff the warrant so directed, and took the officer and his assistant in his carriage to a house where Hale was to be met with. Arrived there, Price's assistant, *by the direction of Roberts* (who told him he might safely do so, and intimated to him that unless the caption was effected the sheriff would be ruled to return the writ), obtained access to the house by thrusting his hand through some paper which was pasted over a broken pane, and so undoing the fastening of the window, and captured the party. The present action was brought for the escape of Hale from this custody.

On the part of the defendant it was contended, that, the arrest being illegal, the sheriff had no right to detain Hale, and consequently could not be liable for his escape; and that, under the circumstances, Price could not be considered as the agent of the sheriff, but as the special bailiff of the plaintiff, for whose acts the sheriff was not responsible; and in support of that position *Ford* v. *Leche*, 6 Ad. & E. 699, 1 N. & P. 737, was cited. There, the plaintiff, commencing an action against one Dickenson, wrote to the sheriff—"Ford *v.* Dickenson,—I inclose you a writ herein, and shall feel obliged by your granting a warrant thereon, directed to Mee and Bateman. I shall write to Bateman in a day or two." The warrant was accordingly made out, and was afterwards delivered to Bateman: it was held that this was sufficient evidence that Bateman

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was employed by the plaintiff as a special bailiff, so as to absolve the sheriff from liability for an escape.

Upon the authority of that case, his lordship nonsuited the plaintiff.

R. V. Richards, in Michaelmas Term last, obtained a rule for a new trial.—He relied on *Jones* v. *Hoggart*, 4 Dowl. 557, where it was held by Coleridge, J., that the mere request to the sheriff to deliver his warrant to a particular person, is not sufficient to constitute the officer the plaintiff's special bailiff. "Because," says his lordship, "we know in point of practice that particular bailiffs are employed by certain attorneys to perform all the business of their office."

Wilde and *Ludlow*, Serjeants, and *Gray*, now shewed cause.—Two questions arise in this case—first, whether Hale was ever legally in the custody of the sheriff—secondly, whether, under the circumstances, Price, the officer who made the arrest, was acting in his ordinary capacity of bailiff of the sheriff, or as the agent or special bailiff of the plaintiff.

1. Arrest illegal.

1. To render the sheriff liable for an escape, the custody must be legal. That Hale never was in legal custody, cannot for a moment be doubted—*Semaine's* Case, 5 Rep. 91, Yelv. 29; *Lee* v. *Gansel*, Cowp. 1, 1-46: and the sheriff

(1-46) Lord Mansfield, in that case, speaking of Parke v. Evans, Hobart, 62, and Winterhouse v. Saltmarsh, Hobart, 263, observes: "I lay stress on this to shew how *strictly* the privilege has been understood, when the outer door or *window* is secure, and when the entrance has not been forcible *through either of* them, so as to lay *open* the house and its inhabitants to insult and violence from without." And he proceeds to cite the following passage from Foster's C. L., tit. Homicide, c. 3, § 20—"The rule that every man's house is his castle, when applied to arrests on legal process, has been carried as far as political justice will warrant, and perhaps further than in the scale of reason and sound policy they will warrant.

could not legally hold him in custody—*Barratt* v. *Price*, 2 M. & Scott, 634, 9 Bing. 566; *Pearson* v. *Yewens*, 5 New Cases, 489, 7 Scott, 435.

2. The officer the agent of the party.

2. Upon the second point the facts are short and decisive. The plaintiff's agent called at the sheriff's office and desired that the warrant might be directed to Price, undertaking himself to instruct the officer, and thus depriving the sheriff of the ordinary means of controlling the execution of the process. Having obtained the warrant so directed, he drove the officer and his assistant to the place where the party was to be found, and encouraged them to make the caption in the illegal manner before described—a mode which it may fairly be assumed the officer would not have adopted had he been left to the exercise of his own discretion. This is not, therefore, like the case of *Balson* v. *Meggat*, 4 Dowl. 557, where the attorney merely went to the office and named a particular officer: but here the officer was entirely withdrawn from the control of the sheriff. The case is in no respect distinguishable from *Ford* v. *Leche*. Speaking of *Balson* v. *Meggat*, Lord Denman there says that it "decided only that the expression used in that case (amounting to nothing more than a request that a particular officer might be employed) was not to be taken as an appointment of a special bailiff, to supersede the sheriff." And Coleridge, J., says: "Suppose a plaintiff, having confidence in a particular bailiff, requires that he shall arrest a party for a large sum of money, but, in the mean time, another bailiff, in whom he has no confidence, arrests the same party for a small sum; according to the argument here urged against

But in cases of life we must adhere to rules well known and established. But this rule is not one of those that will admit of any *extension*. It must, therefore, as I have before hinted, be confined to the breach of *windows* and of *outer doors* intended for the security of the house against persons from without, endeavouring to break in."

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the sheriff, the special bailiff would cease to be agent, or to have any authority, from the time of the arrest." The authorities are clear, that the appointment of a special bailiff, or any interference by the plaintiff or his attorney in the mode of acting, discharges the sheriff from responsibility—*De Moranda* v. *Dunkin*, 4 T. R. 119; *Porter* v. *Viner*, 1 Chit. 613, n.; *Pallister* v. *Pallister*, 1 Chit. 614, n.; *Foster* v. *Blakelock*, 8 D. & R. 48, 5 B. & C. 329.

1. As to the legality of the arrest.

R. V. Richards, in support of the rule.—1. If the party who made the arrest was the bailiff of the sheriff, to permit the sheriff to say that the arrest was illegal, would be to allow him to take advantage of his own wrong. All the cases in which the propriety of the arrest has been discussed, have arisen between the party arrested and the sheriff.

2. Officer not the special bailiff of the plaintiff.

2. There is no pretence for saying that the officer in this case was constituted the special bailiff of the party. It is well known, that, in London and Middlesex, every attorney procures all writs issuing from his office to be directed to a particular officer: and it has been held over and over again that that does not constitute him a special bailiff so as to relieve the sheriff—*Balson* v. *Meggat*, 4 Dowl. 557; *Corbett* v. *Brown*, 6 Dowl. 794. In *Ford* v. *Leche*, the circumstances were very different: there, the sheriff was restrained from the ordinary exercise of his duty; the bailiff could take no step until he had received his instructions from the plaintiff: and it cannot be desirable to extend the principle there laid down.

The officer the special bailiff of the party.

TINDAL, C. J.—I think this case may be decided upon a very safe ground, by holding that the illegal arrest by breaking open the window of the house where Hale was found, was not the act of the sheriff, but of Roberts, the plaintiff's agent, who constituted Price his special bailiff. If the matter had rested upon the application by Roberts

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to the sheriff to have the warrant directed to Price, and his taking it away with him, the case would have been brought very nearly within that of *Ford* v. *Leche*. But, when we find Roberts conveying the officer and his assistant to the scene of action, and, when the officer expresses a doubt as to the propriety of obtaining ingress by forcing the window, assuring him that he may safely do so, there cannot be a doubt but that the officer ceased to be the bailiff of the sheriff, and became the agent of the plaintiff. It is difficult to suppose that the officer would have proceeded as he did, unless urged to it by Roberts, representing the plaintiff: and after that it would be too much to hold the sheriff to be liable to an action for an escape. Therefore I think the rule for setting aside the nonsuit must be discharged.

VAUGHAN, J.—I am of the same opinion. It is admitted that merely requesting the sheriff to direct his warrant to an officer named by the party or his attorney will not make such officer a special bailiff, so as to relieve the sheriff from responsibility. But, here, not only does Roberts, the agent of the plaintiff, name the officer, but he obtains the warrant from the undersheriff, and himself delivers it to the officer, accompanies him to the house where Hale is to be found, and, controlling the judgment of the officer, tells him with something like a threat that he may lawfully proceed to make the caption in the illegal manner that has been shewn. On the ground, therefore, that the plaintiff, by the conduct of her agent, limited and controlled the free agency of the officer, the sheriff ceased to be responsible for his acts.

COLTMAN, J.—I am of the same opinion. Price was the special bailiff of the plaintiff, not from the mere circumstance of Roberts requesting the undersheriff to direct the warrant to him, but from the whole conduct of Roberts, in

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himself obtaining the warrant, accompanying the officer to the place where Hale was to be met with, and causing the arrest to be made under his own immediate direction. Undoubtedly, where a special bailiff is appointed, the privilege of the sheriff ceases when once the party is in custody, that is, in legal custody. Here, the custody was not legal; and the plaintiff being party to the illegal mode of effecting the caption, the sheriff's exemption from liability still continues.

ERSKINE, J.—I concur with the rest of the court, on the ground that the evidence of Roberts clearly shewed that Price had been by him appointed special bailiff. Had the evidence been less precise, or had it proceeded from an adverse witness, then the plaintiff would have been entitled to have it submitted to the jury. But, in fact, Roberts might have been considered as himself the plaintiff; and his evidence could lead to no other conclusion.

Rule discharged.

Friday, May 31st.

Held, that the following memorandum, signed by the defendant, was sufficient to charge him within the statute of frauds: —"I hereby guarantee to you the payment of the proceeds of the goods you have consigned to my brother J. T., of Sydney, and also any future shipments you may make to him, in consideration of the sum of 2*s.* 6*d.* *paid to me*, which I hereby acknowledge to have received"—it being the necessary intendment that the consideration was paid *by the plaintiff*.

DUTCHMAN *v.* ROBERT TOOTH.

ASSUMPSIT on a guarantie. The declaration stated that the plaintiff, theretofore, and before the making of the promise of the defendant thereinafter next mentioned, to wit, on the 3rd January, 1833, had in and by a certain ship known as his the plaintiff's ship the "John Woodall," Captain Henderson, shipped and consigned certain goods of the plaintiff of great value, to wit, of the value of 2,000*l.*, to the defendant's brother John Tooth, of Sydney (being a certain place beyond the seas), to be sold and disposed of by the said John Tooth for and on account of the plaintiff,

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for commission and reward to him in that behalf; and thereupon, theretofore, to wit, on the 29th January, 1833, in consideration that the plaintiff, at the defendant's request, had paid to the defendant a certain sum of money, to wit, 2*s.* 6*d.*, he the defendant then promised the plaintiff to guarantee him the payment of the proceeds of the said goods so consigned to the said John Tooth as aforesaid, and also any future shipments he the plaintiff might make to the said John Tooth: that the plaintiff, confiding in and on the faith of the said promise, did afterwards, to wit, on the 17th May, 1834, and on divers other days and times between that day and the commencement of this suit, make divers shipments of goods of him the plaintiff, of a large value, to wit, of the value of 1,000*l.*, to the said John Tooth, of Sydney aforesaid, to be sold and disposed of by him the said John Tooth for and on account of the plaintiff, for commission and reward to him the said John Tooth in that behalf: that the said several goods so consigned to the said John Tooth as aforesaid, afterwards, to wit, on the 1st October, 1834, were had and received by him the said John Tooth for the purpose aforesaid; and that he the said John Tooth afterwards, to wit, on the day and year last aforesaid, sold and disposed of the same for and on account of the plaintiff, for divers sums of money amounting to a large sum of money, to wit, the sum of 3,000*l.*: and, although the said John Tooth afterwards, to wit, on the day and year last aforesaid, had and received the said sums of money for which the said goods were sold as aforesaid, being the proceeds of the said goods; and although the plaintiff afterwards, to wit, on the day and year last aforesaid, requested the said John Tooth to pay him the same, and the said John Tooth ought to have so done; and although a reasonable time and the proper time for that purpose had long since, and before the commencement of this suit, elapsed; yet the said John Tooth did not nor would when he was requested as aforesaid, or at any time hitherto, pay the

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plaintiff the said proceeds of the said goods, or any part thereof, or the said sum of 3,000*l.*, or any part thereof, but wholly refused and neglected so to do; of all which said several premises the defendant afterwards, and before the commencement of this suit, to wit, on the 3rd April, 1838, had notice, and was then requested by the plaintiff to guarantee to him the payment of such proceeds as aforesaid; and although a reasonable time for that purpose had long since, and before the commencement of this suit, elapsed; yet the defendant, disregarding his said promise, did not nor would, when he was requested as aforesaid, or within such reasonable time as last aforesaid, or at any time hitherto, guarantee to the plaintiff the payment of or pay him the said proceeds of the said goods, or any part of such proceeds, or the said sum of 3,000*l.*, or any part thereof, but had hitherto wholly refused so to do, and the said proceeds, amounting to a large sum of money, to wit, the sum of 3,000*l.*, were still wholly unguaranteed and unpaid to the plaintiff.

Ninth plea.

The defendant pleaded, ninthly—that the promise in the declaration mentioned was a special promise on the part of him the defendant to answer for the debt and default of the said John Tooth in the declaration mentioned, and that no agreement in respect of or relating to the said promise or cause of action, nor any memorandum or note thereof, wherein the consideration for the said special promise was stated or shewn, was in writing and signed by the said defendant, or by any other person by him thereunto lawfully authorized, according to the form of the statute in such case made and provided; and that the said promise in the declaration mentioned was and is contained in a certain memorandum in writing signed by the defendant, and which was and is as follows:—"I hereby guarantee to you the payment of the proceeds of the goods you have consigned to my brother, John Tooth, of Sydney, in your ship, the 'John Woodall,' Captain Henderson, and also

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any future shipments you may make to him, in consideration of the sum of 2*s.* 6*d.* paid to me, which I hereby acknowledge to have received"—verification.

Special demurrer.

To this plea the plaintiff demurred specially, assigning for causes—that the defendant in and by that plea first alleged that no agreement in respect of or relating to the said promise or cause of action, nor any memorandum or note thereof wherein the consideration for the said special promise was stated or shewn, was in writing and signed by the defendant or by any other person by him thereto lawfully authorized, according to the form of the statute in such case made and provided, and the defendant in and by that plea then proceeded to state and set forth a memorandum in writing signed by the defendant of the agreement in respect of and relating to the said promise, wherein the consideration for the said special promise was and is stated and shewn, according to the statute in such case made and provided; by reason whereof the said plea was altogether uncertain, contradictory, repugnant, and inconsistent, and no certain or proper issue could be taken thereon—that the said plea was inconsistent, contradictory, and repugnant, inasmuch as the defendant, after therein alleging that such a memorandum as in that plea first mentioned did not exist, proceeded to shew that such a memorandum as in that plea mentioned did exist, and stated and set forth the same, which was altogether insensible and contradictory, and no certain or proper issue could be taken on the said plea—that the said plea was altogether insensible, as the defendant in and by that plea both denied and admitted the existence of such a memorandum in writing as therein first mentioned—that it appeared from and by the said plea that there was such a memorandum in writing, signed by the defendant, of the special promise upon which this action is brought as prescribed and required by the statute in such case made and provided—that the said memoran-

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dum in writing signed by the defendant, and stated and set forth in the said last plea, was and is such a memorandum as in that behalf required by the statute in such case made and provided, and also was and is a sufficient memorandum according to the statute in such case made and provided, to enable and entitle the plaintiff to maintain this action for the breaches in the declaration mentioned of the promise therein also mentioned—that the said plea was an argumentative denial of the said promise in the declaration mentioned, and amounted to non assumpsit; and that, instead of stating the several matters in the said plea alleged, the defendant ought, if he intended to deny the said promise, to have pleaded non assumpsit—that the plea was an argumentative and circuitous denial of the promise mentioned in the declaration, and tended to unnecessary prolixity and length of pleading—and that the plea was in other respects inconsistent, repugnant, contradictory, uncertain, informal, and insufficient &c.

Joinder.

The defendant joined in demurrer.

Gurney, in support of the demurrer, submitted that the pecuniary consideration stated on the face of the guarantie, the adequacy of which could not be questioned, was sufficient to satisfy the statute. [The Court called on—

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ABBOTT and Others, Assignees of JOHN PHILLIMORE HICKS and CHARLES EDWARD HICKS, Bankrupts, *v.* HENRY PURNELL HICKS.

Friday, May 31st

A., B., and C., traders in partnership, were indebted to one H. H. in 51,891*l.* 12*s.* Upon a dissolution of the partnership, it was found that C., the retiring partner, was indebted to the firm in 6,817*l.* 9*s.* 8*d.*, supposing all the debts of the firm (including that of H. H.) to be paid; whereupon it was agreed between them that C. should pay to A. and B. the 6,817*l.* 9*s.* 8*d.*, and should assign to them all the assets and effects of the firm, they undertaking to pay the partnership debts. A. and B. subsequently becoming bankrupt, leaving unpaid of the debt due to H. H. a balance of 47,000*l.*:— Held, that C.'s liability to H. H. did not constitute a debt or mutual credit which could be set off under the 6 Geo. 4, c. 16, s. 50, in an action by the assignees of A. and B. against him for the recovery of the 6,817*l.* 9*s.* 8*d.* due from him to the firm; nor a debt proveable under the 52nd or 56th sections.

THIS was an action of assumpsit brought by the plaintiffs, assignees of the estate and effects of J. P. Hicks and C. E. Hicks, to recover from the defendant a sum of 6,817*l.* 9*s.* 8*d.*, alleged to be due to the estate of the bankrupts on a settlement of accounts.

The declaration stated that the defendant, before the said J. P. Hicks and C. E. Hicks became bankrupt, to wit, on the 2nd March, 1835, was indebted to the said J. P. Hicks and C. E. Hicks in 100*l.*, for the price and value of goods before then sold and delivered by the said J. P. Hicks and C. E. Hicks to the defendant at his request; and in 6,000*l.* for money before then lent by the said J. P. Hicks and C. E. Hicks to the defendant at his request; and in 6,000*l.* for money before then paid by the said J. P. Hicks and C. E. Hicks for the use of the defendant at his request; and in 6,000*l.* for money before then received by the defendant for the use of the said J. P. Hicks and C. E. Hicks; and in 2,000*l.* for interest for the forbearance by the said J. P. Hicks and C. E. Hicks to the defendant at his request for divers spaces of time before then of money due and owing from the defendant to the said J. P. Hicks and C. E. Hicks; and in 6,000*l.* for money found to be due from the defendant to the said J. P. Hicks and C. E. Hicks on an account then stated between them; that the defendant afterwards, and before the said J. P. Hicks and C. E. Hicks became bankrupt, to wit, on the day and year aforesaid, in consideration of the premises respectively, promised the said J. P. Hicks and C. E.

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Hicks to pay them the said several monies respectively on request: Yet the defendant had disregarded his promises, and had not paid either of the said monies, or any part thereof, to the said J. P. Hicks and C. E. Hicks, or either of them, before their bankruptcy, or to the plaintiffs, assignees as aforesaid, or any or either of them, since the said bankruptcy: That, after the said bankruptcy, to wit, on the 1st February, 1838, the defendant was indebted to the plaintiffs as assignees as aforesaid in 10,000*l.* for money found to be due from the defendant to the plaintiffs as assignees as aforesaid, on an account then stated between the defendant and the plaintiffs as assignees as aforesaid; and in 1,000*l.* for interest for the forbearance by the plaintiffs as assignees as aforesaid to the defendant, at his request, for divers spaces of time before then, of money due and owing from the defendant to the plaintiffs as assignees as aforesaid; that the defendant afterwards, to wit, on the day and year last aforesaid, in consideration of the premises respectively, then promised the plaintiffs, as assignees as aforesaid, to pay to them the said last-mentioned sums on request: Yet the defendant had disregarded his promises, and had not paid the said last-mentioned monies, or any part thereof; to the damage of the plaintiffs as assignees as aforesaid, &c.

Plea—That the bankrupts and the defendant were partners;

The defendant, amongst other pleas, pleaded as follows:—That, before the said J. P. Hicks and C. E. Hicks, or either of them, became bankrupt, to wit, on the 1st January, 1821, the said J. P. Hicks and the said C. E. Hicks, and the defendant, used, exercised, and carried on together and in copartnership the trade and business of cloth manufacturers, and were and continued to be such copartners in the said trade and business continually until and upon, to wit, the 1st January, 1828, when the said copartnership was duly ended, dissolved, and ceased; that, during such copartnership, they the said J. P. Hicks, C. E. Hicks, and the defendant, became, and at and upon the

that, on the determination of the partnership, the

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said determination of the said copartnership, to wit, on the day and year last aforesaid, were, duly indebted as such co-partners to one Henry Hicks in a certain large sum of money, to wit, 51,891*l.* 12*s.*, for a true and just debt upon an account stated between the said Henry Hicks and the said J. P. Hicks and C. E. Hicks and the defendant, and he the defendant during the said co-partnership became, and at and upon the said termination thereof, to wit, on the day and year last aforesaid, as such partner of and with the said J. P. Hicks and C. E. Hicks, was, indebted to, and upon a settlement of the accounts of the said co-partnership, and upon payment by them the said J. P. Hicks and C. E. Hicks and the defendant of the debts and liabilities of the said copartnership, including therein the said debt so due to the said Henry Hicks, would have been liable to pay to, the said co-partnership a certain large sum of money, to wit, 6,817*l.* 9*s.* 8*d.*; and thereupon afterwards, and before the bankruptcy of the said J. P. Hicks and C. E. Hicks, or either of them, to wit, on the 6th February, 1830, the said debt and sum of 51,891*l.* 12*s.* remaining due and unpaid to the said Henry Hicks, and he the defendant being indebted to, and upon such settlement and payment of the debts and liabilities of the said copartnership as aforesaid liable to pay to, the said copartnership firm the sum of 6,817*l.* 9*s.* 8*d.* as aforesaid, it was agreed by and between the said J. P. Hicks, C. E. Hicks, and the defendant, that they the said J. P. Hicks and C. E. Hicks should have and take to and for their own use and benefit the assets and effects of the said co-partnership, and should pay the said debt and sum of 51,891*l.* 12*s.* to the said Henry Hicks, and that he the defendant should pay the said sum of 6,817*l.* 9*s.* 8*d.* to them the said J. P. Hicks and C. E. Hicks; and, thereupon, to wit, on the day and year last aforesaid, and before the bankruptcy of the said J. P. Hicks and C. E. Hicks, or either of them, in consideration that the defendant, at the special instance and request of the

firm was indebted to H. H. in 51,891*l.* 12*s.*,

and the defendant, upon a settlement of the accounts, was indebted to the partnership in 6,817*l.* 9*s.* 8*d.*;

that it was agreed between the bankrupts and the defendant, that the former should take to the assets and pay H. H.'s debt, and that the latter should pay his debt to the firm.

Mutual promises.

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said J. P. Hicks and C. E. Hicks, had then undertaken and faithfully promised the said J. P. Hicks and C. E. Hicks to pay them the said sum of 6,817*l.* 9*s.* 8*d.*, and would suffer and permit them the said J. P. Hicks and C. E. Hicks to have and take to and for their own use and benefit the assets and effects of the said co-partnership, they the said J. P. Hicks and C. E. Hicks undertook and then faithfully promised the defendant to pay the said debt and sum of 51,891*l.* 12*s.* to the said Henry Hicks, and save harmless and indemnify the defendant against the payment of the same: And the defendant further said, that, although he the defendant did permit and suffer the said J. P. Hicks and C. E. Hicks to have and take, and though they the said J. P. Hicks and C. E. Hicks did have and take to and for their own use and benefit the assets and effects of the said co-partnership; and although the said J. P. Hicks and C. E. Hicks were afterwards, and before they or either of them became bankrupt, to wit, on the 1st of January, 1835, requested by the said Henry Hicks to pay him the said debt and sum of 51,891*l.* 12*s.*; yet the said J. P. Hicks and C. E. Hicks then neglected and refused so to do, and then paid but a small part thereof, to wit, 4,891*l.* 12*s.*, and the residue thereof, to wit, 47,000*l.*, still remained due and unpaid to the said

That the bankrupts did not pay H. H.'s debt,

[redacted]

said sum of 51,891*l.* 12*s.*, and that he the defendant had not when the said credit was so given as aforesaid notice of any acts of bankruptcy committed by the said J. P. Hicks and C. E. Hicks, nor of any act of bankruptcy committed by either of them: And the defendant further said, that, by means of the premises in that plea mentioned, he, the defendant, before and at the time of the bankruptcy of the said J. P. Hicks and C. E. Hicks, and each of them, had, and from thence hitherto until and at the time of the commencement of the suit had, and still has, a demand upon the said J. P. Hicks and C. E. Hicks to a certain large amount and sum, to wit, the said sum of 47,000*l.*, which said last-mentioned sum was due and owing from the said J. P. Hicks and C. E. Hicks to the defendant, and exceeded the damages sustained by the plaintiffs as assignees as aforesaid by reason of the non-performance by the defendant of the said several promises as to the said first six counts of the said declaration, and out of which said sum of money so due and owing to the defendant as last aforesaid, he the defendant was ready and willing and thereby offered to set off and allow to the plaintiffs the full amount of the said last-mentioned damages, according to the form of the statute in such case made and provided—verification.

That, by means of the premises, the defendant had a demand against the bankrupts for 47,000*l.*, which he offered to set off &c.

To this plea the plaintiffs demurred specially; assigning for causes—that the defendant had not in or by his said plea stated, nor did it appear therein (although the same professed to be and was pleaded by way of set-off or mutual credit) that any mutual debt or mutual credit within the meaning of the statutes in force concerning bankrupts before or at the time of the bankruptcy of the said J. P. Hicks and C. E. Hicks subsisted between the defendant and them, nor did it appear in or by the said plea that the said bankrupts before or at the time of their bankruptcy were indebted to the defendant in any sum or sums of money, nor did it appear thereby that the said J. P. Hicks and C. E. Hicks before or at the time of their bankruptcy

Special demurrer—That the plea disclosed no mutual debt or mutual credit, within the statute.

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were liable to pay any sum or sums of money to or for the use of the defendant, nor that any credit was then given by him to them which could ever become a debt against them or their estate; but the said plea only stated and shewed, that, through the neglect and refusal of the said J. P. Hicks and C. E. Hicks, he the defendant remained liable to pay to one Henry Hicks a sum of 47,000*l.*, which had accrued to the said Henry Hicks from the defendant and the said bankrupts jointly during their co-partnership, and which were the monies the defendant offered to set off and allow to the plaintiffs—that it was not stated nor did it appear in or by the said plea that the defendant performed or fulfilled his undertaking or promise made to the said J. P. Hicks and C. E. Hicks as in his said plea mentioned to pay the said sum of 6,817*l.* 19*s.* 8*d.*, by payment of the same or any part thereof—that the defendant had not in or by his said plea confessed and avoided or traversed and denied the several causes of action in the first six counts of the declaration mentioned, and to which the same was pleaded—and that the plea was in other respects uncertain, informal, and insufficient &c.

Joinder. The defendant joined in demurrer.

1. Payment of the 6817*l.*

R. V. Richards, in support of the demurrer.—To entitle the defendant to avail himself of the agreement set forth

other person, the commissioners shall state the account between them, and one debt or demand may be set against another, notwithstanding such prior act of bankruptcy committed by such bankrupt before the credit given to or the debt contracted by him, and what shall appear due on either side on the balance of such account, and no more, shall be claimed or paid on either side respectively, and every debt or demand thereby made proveable against the estate of the bankrupt, may also be set off in manner aforesaid against such estate: provided that the person claiming the benefit of such set-off had not, when such credit was given, notice of an act of bankruptcy by such bankrupt committed." To constitute a case of mutual credits within the statute, they must be existing at the time of the bankruptcy—*Ex parte Hale*, 3 Ves. 304; *Hankey* v. *Smith*, 3 T. R. 507, n.; and must be such as will ultimately end in debts, such as may be computed and ascertained by the commissioners—*Rose* v. *Sims*, 1 B. & Ad. 521; *Gibson* v. *Bell*, 1 New Cases, 743, 1 Scott, 712. Here, the liability of the defendant to Henry Hicks is merely contingent: he may never be called upon. In *Rose* v. *Sims*, A. having given the defendant his acceptance for 20*l.*, the defendant, in consideration thereof, undertook that he would indorse to A. a bill drawn by him (the defendant) on E. E., payable to the defendant's order. He gave the bill, but would not indorse it. On assumpsit brought by the assignees of A., who had become bankrupt, and whose acceptance was dishonored: it was held that the contract to indorse was not a subject of "mutual credit" within the 6 Geo. 4, c. 16, s. 50, and could not have been set off by the assignees against the 20*l.* due from A. to the defendant. Parke, J., there says: "This is not a case of mutual credit within the bankrupt act; it is merely a case where a cause of action arises for the non-performance of a contract. The provision with respect to mutual credits is confined to debts between the bankrupt and other parties, or to trans-

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actions *necessarily ending in debts:* the cause of action here did not fall within either description." And Taunton, J., said: "A mutual credit may be said to exist where there is a debt, or something which will end in a debt. Here, neither was shewn, but only a cause of action, namely, the failure of the defendant to indorse pursuant to his engagement. Immediately upon that failure, a right of action accrued to the plaintiff, but not a debt. The damages were unliquidated, and their amount dependent on circumstances. How could the commissioners in such a case have stated an account between the parties, as directed by the act?" And in *Gibson* v. *Bell,* it was held, in an action by assignees of a bankrupt against the defendant for not accepting bills of exchange (pursuant to an agreement with the defendant) in payment for goods sold and delivered by the bankrupt to the defendant, that the latter might set off a debt due to him for money lent to the bankrupt before his bankruptcy. The ground of this latter decision appears from the conclusion of the judgment to be, that the demand was "a mere pecuniary demand, which the commissioners or assignees might have stated in account between the defendant and the bankrupt; a demand which, although unliquidated at the moment, was capable of being reduced to certainty by a simple calculation, where no special damage had been incurred." Here, if no bankruptcy had intervened, the damages clearly would be unliquidated. In *Morley* v. *Inglis,* 5 Scott, 314, 4 New Cases, 58, a demand arising out of a contract of guarantie was held not to be the subject of a set-off. And in *Green* v *Bicknell,* 8 Ad. & E. 701, 3 N. & P. 634, in a special case it was stated, that, by contract between B. and G., the latter had agreed to sell to the former half the oil &c. which should arrive by a certain ship, which B. was to receive within fourteen days after the landing of the cargo, and pay for, at the expiration of that time, by bills or money, at a specified price per tun, with customary

allowances; that the ship arrived, and the cargo was landed, and G. tendered the oil to B. at the end of the fourteen days; that the quantity of oil, after allowances, &c., was a certain number of tuns stated in the case; that, at the time of the tender, the market price of oil was lower than the contract price by an amount stated; that B., on the tender being made, refused to accept; and that the difference of prices was within the knowledge of the parties: and it was held, that, B. having become bankrupt after the refusal, G. could not prove for this breach of contract under the commission; for that, although G.'s claim would be measured by the difference between the contract and market prices at the time when B. should have fulfilled his contract, yet the case did not shew that the data on which the calculation must proceed were so settled as to admit of no dispute, and render the intervention of a jury unnecessary; and consequently the claim of G. was not for a debt, but for damages. Lord Denman, in delivering the judgment of the court, there says: "In many cases in Chancery, proof has been admitted of the value of stock agreed to be transferred at a given day. Most of them are cases of loans of stock; but there is one instance of allowing the value of a sum of stock to be proved, which was covenanted to be transferred by a marriage settlement—*Ex parte Campbell*, 16 Ves. 244. We were strongly pressed with these authorities, as establishing the principle that any right to recover money, or money's worth, may be treated as a debt, when its amount may be fixed by calculation. But we think that those cases must be regarded as exceptions to the rule, which is, generally speaking, that no claim of this nature shall be proveable as a debt, for which the intervention of a jury is necessary." *Rose* v. *Hart*, 8 Taunt. 499, and many earlier cases, all lead to the same conclusion.

Bramwell, in support of the plea.—The result of the

upon to pay something, how can he say that there is any *debt* due from the bankrupts to him?] *Arbouin* v. *Tritton*, Holt, 408, shews, that, where the contract is in itself one that may be set off, it is immaterial whether the damages are liquidated or not. There, one Goren, before his bankruptcy, discounted certain bills of exchange with Tritton & Co., his bankers, who gave him immediate credit for the value of the bills in his account, minus the discount: a balance was likewise struck before the bankruptcy, and whilst the bills were yet running, in favour of Goren, when the bankers admitted that they had in their hands 934*l.* 8*s.* 8*d.* due to Goren, giving him credit for the bills then running: Goren became a bankrupt, and the bills were dishonored: in an action against the bankers for the balance admitted to be due to the bankrupt, before his bankruptcy, it was held that they had a right to set off against such claim the amount of the dishonored bills, under the 5 Geo. 2, c. 30, s. 28.

Certificate a bar to any claim arising out of the agreement.

Upon the facts stated in the plea, the certificate of the bankrupts would be a bar to any claim arising under the contract—*Wood* v. *Dodgson*, 2 M. & S. 195. There, upon a dissolution of partnership between three partners, two of the three assigned to the other all their shares in the partnership debts and effects, and the other covenanted to pay all debts then due from the partnership, and to indemnify the two from the payment of the same, and from all actions and costs by reason of the nonpayment of the same, and afterwards became bankrupt, and a commission issued against him, under which he obtained his certificate, and afterwards the holder of a bill accepted by the three partners, and due before the dissolution of the partnership, sued the two, and they were obliged to pay the bill: and it was held, that, by the statute 49 Geo. 3, c. 121, s. 8 (147), the certificate might be pleaded in discharge of an

(147) Which enacted, that, "where, at the time of issuing the commission, any person should be surety for or liable for any debt

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action brought by the two against the other upon his covenant. Lord Ellenborough there said: "The words of the statute are, 'where any person shall be surety for or liable for any debt of the bankrupt.' Here the plaintiffs have assigned all their interest in the partnership effects, in consideration of a covenant of indemnity on the part of the bankrupt, which left them still liable as before to the original creditors of the partnership; they were liable at law as co-debtors with the bankrupt for his and their own debt, but in equity he was solely liable, and they were sureties; for, by the covenant he became, as between the parties to the covenant, the principal debtor, the debt was his debt, although as to other parties the plaintiffs still remain liable, and therefore when they paid this debt, they paid it in his discharge. I cannot therefore say that this case does not fall within the act of parliament, which does not merely contemplate legal, but equitable liability." That is precisely the present case: and the principle was recognized in *Moody* v. *King*, 3 B & C. 558, 4 D. & R. 30, and in *Aflalo* v. *Fourdrinier*, 3 M. & P. 743, 6 Bing. 306. This is a claim that might have been proved under the 6 Geo. 4, c. 16, s. 52 (148), and therefore one that would

of the bankrupt, it should be law- bankruptcy for the whole debt in

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be barred by the certificate: and all debts that are proveable may be set off. Suppose the defendant pays the money now, might he not plead such payment puis darrein continuance? It has been repeatedly held that a solvent partner who pays a partnership debt may prove it as a debt against the bankrupt firm: *Ex parte Taylor*, 2 Rose, 175—*Ex parte Ogilby*, 3 Ves. & B. 133, 2 Rose, 177. [*Erskine*, J.—Not until the joint debts are satisfied—*Ex parte Ellis*, 2 Glyn. & Jam. 312.] In *Ex parte Grazebrook*, 2 Deac. & Chit. 186, all the partnership debts had not been paid, and yet the solvent partner was permitted to prove. In *Ex parte Lobbon*, 17 Ves. 334, where a bill, after proof under a commission against the acceptor, was paid by the drawer, who after a dividend arrested the bankrupt for the balance, the bankrupt was held entitled to his discharge under the 49 Geo. 3, c. 121, ss. 8, 14. Even if this is, as has been suggested, a case of guarantie, the claim of the defendant would be proveable under the 6 Geo. 4, c. 16, s. 56 (149)—*Ex parte Myers*, Mont. & Bligh, 229, 2 Deac.

creditor as to the dividends and all other rights under the said commission which such creditor possessed or would be entitled to in respect of such proof; or, if the creditor shall not have proved under the commission, such surety or person liable, or bail, shall be entitled to prove *his demand in respect of such payment* as a debt under the commission, not disturbing the former dividends, and may receive dividends with the other creditors, although he may have become surety, liable, or bail as aforesaid, after an act of bankruptcy committed by such bankrupt: provided that such person had not, when he became such surety or bail, or so liable as aforesaid, notice of any act of bankruptcy by such bankrupt committed."

(149) Which enacts "that, if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are thereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon; or, if such value shall not be so ascertained before the contingency shall have happened, then

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& Chit. 251; *Ex parte Lewis*, Mont. & M'A. 426; Eden's Bankrupt Laws, 126. [*Erskine*, J.—*Ex parte Myers* is very much modified by *Ex parte Marshall*, 1 Mont. & Ayr. 145, and *Ex parte Simpson*, 1 Mont. & Ayr. 541.] In *Gaskell* v. *Lindsay*, Holt, 212, A. & Co. guaranteed to B. & Co. payment for any goods which they might supply to C. within a certain period, at a credit of two and two months. C. became indebted to B. & Co. for goods, and gave them three bills of exchange in payment, indorsed by A. & Co., who shortly afterwards became bankrupts. One of these bills was dishonoured before and the other two after the bankruptcy. C. was likewise indebted to B. & Co. before the bankruptcy of A. & Co., for some goods, for which they had a right only to call on C. to give them a bill at two months at the time of A. & Co.'s commission. In an action brought upon the guarantie against A. & Co., it was held that their certificate was a good defence, by virtue of the statute 49 Geo. 3, c. 121, s. 9.

R. V. Richards, in reply.—*Arbouin* v. *Tritton* was a clear case of mutual credit. Debts upon contingency are only proveable where they admit of calculation: but, how could the commissioners here estimate the value of the contingency—depending, as it does, not only upon whether the

acceptor paying the bill, if any such could be found, would be very much like that of *Gibson* v. *Bell.*

TINDAL, C. J.—The question in this case arises upon the 50th section of the 6 Geo. 4, c. 16, and is, whether or not the plea which has been demurred to discloses a debt, mutual credit, or demand (for, these are the three terms used in the statute), which can form the subject of a set-off within that section. Looking at the plea, I am of opinion that it does not exhibit a state of accounts between bankrupts and the defendant which can give rise to any debt, mutual credit, or demand. The plea states the partnership between the defendant and the bankrupts, and the dissolution of that partnership on the 1st January, 1828; and it then goes on to allege, that, during the partnership, the firm became indebted to one Henry Hicks in 51,891*l.* 12*s.*; that, at the termination of the partnership, the defendant, upon a settlement of the accounts of the firm, and payment of their debts and liabilities (including the debt due to Henry Hicks), was indebted to the firm in 6,817*l.* 9*s.* 8*d.*; that it was agreed between the bankrupts and the defendant, that the former should take to the assets and effects of the copartnership, and should pay the debt of 51,891*l.* 12*s.* to Henry Hicks, and that the defendant should pay to the bankrupts his debt of 6,817*l.* 9*s.* 8*d.*; that, in consideration that the defendant had undertaken to pay the bankrupts the 6,817*l.* 9*s.* 8*d.*, and would permit them to take to their own use the partnership assets and effects, the latter undertook to pay the debt so due to Henry Hicks, and to indemnify the defendant against payment thereof; that the defendant did suffer the bankrupts to take the assets, but they paid only 4,891*l.* 12*s.* of the debt due to Henry Hicks, leaving a balance due to him of 47,000*l.*, for which sum the defendant remained liable to Henry Hicks. The plea then takes up the grounds upon which the defence to this action is sought to be rested: first, the defendant

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says, that, in and by the said agreement, he gave *credit* to the bankrupts in the said sum of 51,891*l.* 12*s.*, having no notice at the time of any act of bankruptcy. Stopping there, I cannot see that it follows as a legal deduction from the situation of the parties, or from the terms of the agreement, that any credit was given: and, at the utmost, the defendant could only be said to give credit for his share of the assets and effects of the partnership. The plea then goes on to say, that, by means of the premises, the defendant had a *demand* upon the bankrupts to the amount of 47,000*l.* I do not see how this can be a consequence from the facts stated in the previous part of the plea: there is no allegation that the defendant has ever advanced a single shilling towards satisfaction of the joint debt. The plea then concludes thus:—"which said last-mentioned sum is *due and owing* from the said J. P. Hicks and C. E. Hicks *to the defendant*, and exceeds the damages sustained by the plaintiffs as assignees as aforesaid by reason of the non-performance by the defendant of the said several promises as to the first six counts of the declaration, and out of which said sum of money so due and owing to the defendant as last aforesaid he the defendant was ready and willing and thereby offered to set off and allow to the plaintiffs the full amount of the said last-mentioned damages," &c. Until the defendant had paid the balance due to Henry Hicks, he clearly could not treat it as a debt owing to him from the bankrupts.

It must be allowed that the plea discloses an apparent, and perhaps a real hardship on the defendant; for, if he now pays the 6,817*l.* 9*s.* 8*d.*, it will go towards a fund applicable to the demands of the creditors of the bankrupts, leaving him still liable for the 47,000*l.* due to Henry Hicks. But this places him in no worse condition than he would have been in if he had paid the 6,817*l.* 9*s.* 8*d.* at the time he retired from the firm.

The question therefore remains, whether the facts stated

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in this plea do or do not entitle the defendant to the set-off claimed. I must confess I never before heard of a liability on a guarantie being treated as a *debt* before the creditor is called upon to pay anything in respect of it. And the defendant's liability here is in the nature of a guarantie. It is perfectly uncertain whether or not the contingency that is to give the defendant a claim upon the bankrupts will ever happen. Who can say that Henry Hicks will ever call upon the defendant for payment of the 47,000*l.*? And, if this plea were held to be a bar to the action, it might be that the defendant would avoid the payment of his debt of 6,817*l.* 9*s.* 8*d.*, and yet incur no liability in respect of the debt of 47,000*l.* Again, the estate of the bankrupts may pay 20*s.* in the pound, and then Henry Hicks would have no demand at all upon the defendant: and that is by no means an impossible case. Again, who is to say, that, though the estate of the bankrupts may not suffice to pay their debts in full, and the defendant may hereafter be called upon by Henry Hicks to make up the deficiency, the bankrupts may not be in a condition to indemnify him? Upon the whole, I think the plea does not shew any debt, credit, or demand which by the statute the defendant is entitled to set off.

Reliance has been placed, on the part of the defendant, upon two cases of *Arbouin* v. *Tritton*, Holt, 408, and *Wood* v. *Dodgson*, 2 M. & S. 195. In *Arbouin* v. *Tritton*, one Goren, before his bankruptcy, had discounted certain bills of exchange with Tritton & Co., his bankers, who gave him immediate credit for the value of the bills in his account, minus the discount; a balance was likewise struck before the bankruptcy, and, whilst the bills were yet running, in favour of Goren, when the bankers admitted that they had in their hands 934*l.* 8*s.* 8*d.* due to Goren, giving him credit for the bills then running: Goren became bankrupt, and the bills were dishonoured: in an action against the bankers for the balance admitted to be due to

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the bankrupt before his bankruptcy, it was held that they were entitled to set off against such claim the amount of the dishonoured bills, under the 5 Geo. 2, c. 30, s. 28. There, the account had been stated under a mistake, and the case was strictly and properly one of mutual credit. So, again, in *Wood* v. *Dodgson*, the facts of which are certainly very similar to those of the present case, but there the retiring partners, against whom the action was brought, had paid the debt, and therefore they were in a condition to prove for it under the commission, and the certificate would be a bar. Neither of these cases consequently stands in our way. Upon the whole, I think the facts set forth in the plea do not afford a defence under the statute, and that the plaintiff is entitled to our judgment.

VAUGHAN, J.—I am of the same opinion. The simple question is whether or not this plea discloses a mutuality of debt, credit, or demand within the 50th section of the 6 Geo. 4, c. 16. With every desire to give the fullest effect to the statute, I think it is impossible to say that it does. The claim on the part of the defendant is not put as a debt, but a credit in respect of the 47,000*l.* due to Henry Hicks. But the defendant has not paid, and may never be called upon to pay, any part of that debt. There can, therefore, clearly be no foundation for a claim to set it off, either as a mutual debt or a mutual credit.

COLTMAN, J.—I am of the same opinion. A guarantie is merely a contract to indemnify upon a contingency, and being in the nature of a claim for unliquidated damages, it cannot form the subject of a mutual credit—*Simpson* v. *Burton*, 4 Moore, 515, 2 B. & B. 89, decided upon the 5 Geo. 2, c. 30, s. 28. The claim of the defendant in this case depends upon a contingency: it can only arise in the event of the defendant being called upon to pay the debt due to Henry Hicks. *Wood* v. *Dodgson*, though very similar

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in its facts to the present case, has this material distinction, the retiring partners had paid the debt, and were entitled to prove for it under the 49 Geo. 3, c. 121, s. 8; and being a debt that was proveable under the commission, it would be barred by the certificate. And I apprehend this case is not within the contemplation of the 56th section of the 6 Geo. 4, c. 16. That clause enacts, "that, if any bankrupt shall, before the issuing of the commission, have contracted any debt payable upon a contingency which shall not have happened before the issuing of such commission, the person with whom such debt has been contracted may, if he think fit, apply to the commissioners to set a value upon such debt, and the commissioners are thereby required to ascertain the value thereof, and to admit such person to prove the amount so ascertained, and to receive dividends thereon." This clearly is not a debt upon contingency, the value of which the commissioners have any means of ascertaining; nor is it one which the defendant could be entitled to set off under the 52nd section.

ERSKINE, J.—I am of the same opinion. This may be a hard case upon the defendant; but it is his own fault that it is so; for, he might have secured himself from all responsibility beyond the 6,817*l.* 9*s.* 8*d.*, by making Henry Hicks a party to the arrangement, instead of relying upon the solvency of his former partners. The sole question for us is, whether or not the defendant's liability for the debt due to Henry Hicks is a debt, demand, or claim which he can be entitled to set off against the debt sought to be recovered in this action. I am not satisfied that it is. It appears from the arrangement set forth in the plea that the assets of the firm were insufficient for the discharge of their liabilities, that the continuing members of the firm were to take to the assets and effects, and to pay

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Payment of the 6,817*l.* 9*s.* 8*d.*, not a condition precedent.

the debts, including the 51,981*l.* 12*s.* due to Henry Hicks, and that the defendant was to pay them 6,817*l.* 9*s.* 8*d.* What claim does this give the defendant against his late partners? The payment by the defendant of the 6,817*l.* 9*s.* 8*d.* certainly was not a condition precedent. But the result of the agreement is merely an undertaking by the bankrupts to indemnify the defendant against the debts for which the three were jointly liable. If the defendant had paid Henry Hicks's demand, he might have proved for the balance against the estate of the bankrupts. The clause in the statute (s. 50) under which the set-off is claimed gives the right to set off any debt or demand that is proveable under the commission, or a claim arising out of a mutual credit. But, what credit had the defendant given the bankrupts here? Certainly not a pecuniary credit. It is said, however, that there was a contingent debt proveable under the 56th section, and consequently a debt that might be the subject of a set-off. But, what debt is there here payable upon a contingency upon which a value can be set by the commissioners? The defendant's liability at the most amounts to this, viz. a possibility that Henry Hicks may call upon him to pay the 47,000*l.* remaining unpaid of the debt due to him from the firm. It needs no argument to shew that that is not susceptible of calculation. *Ex parte Myers*, 1 Mont. & Bligh, 229, where it was held that a debt on a guarantie which did not become absolute before the bankruptcy, is proveable as a contingent debt, was a case very peculiar in its circumstances. There, the bills had become due and were paid before the proof was tendered, and the contingency had happened: and that decision was referred to by the court, and the distinction pointed out in the subsequent case of *Ex parte Marshall*, 1 Mont. & Ayr. 145, where it was held that, where the bankrupt has given an indemnity bond, and the amount of damage is not ascertained when the fiat

issues, there is no debt proveable (151). *Arbouin* v. *Tritton* and *Wood* v. *Dodgson* have been sufficiently answered; and, for the reasons already given, I think the present case distinguishable from all the other authorities that have been referred to.

Judgment for the plaintiffs.

(151) The Chief Judge there says, after time taken to consider —" In my judgment in Ex parte Myers I have not sufficiently marked the distinction between contingent liabilities that may never become debts, and contingent debts that may never become payable. Upon the fullest consideration of all the reported decisions, I am satisfied that claims under the first class upon which no debt has arisen till after the bankruptcy, cannot be proved under the 56th section; but that all claims falling within the latter class, that are either capable of valuation before the contingency happens, or have become payable by the happening of the contingency after the bankruptcy and before proof is tendered, may be admitted."

In re DODINGTON and BAILWARD.

Saturday, June 1st.

A BOND of submission, in the penal sum of 5,000*l.*, was entered into between William Manning Dodington and

By a bond of submission it was provided that the arbitrators should make their award on or before the 20*th August*, 1838, or the umpire his on or before the 20*th September*; each having power to enlarge the time. On the 14th August the arbitrators enlarged the time for making their award to the 2nd October, and again on the 28th September to the 1st November; and in October they communicated to the umpire that there was no probability of their agreeing. The umpire on the 17th September enlarged the time for making his award to the 1st December, and on the 26th November further enlarged the time to the 20th December, before which day he made his award.

The submission recited, amongst other things, that B. was *proprietor of a certain share or shares or other right or interest in or to certain hatches.* By his award the umpire directed that these hatches should be removed *by and at the expense of B.*—so as the award with regard to *one* of them should only concern or relate to such part, share, right, interest, or control which B., his heirs, &c., then had or might thereafter have therein, and not further or otherwise:—Held, on motion for an attachment against B. for non-performance of the award—

First, that the enlargement by the umpire was properly made on the 17th September;

Secondly, that it was not necessary that B. should have had notice in writing of such enlargement—but it was enough that he had a verbal intimation of the fact before the attachment was moved for;

Thirdly, that the authority of the umpire was properly called into existence;

Fourthly, that it was duly exercised.

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In re Dodington and Bailward.

Bailward proprietor of or interested in certain weirs and hatches.

Thomas Samuel Bailward in the 21st October, 1837. The bond recited that *Bailward was proprietor or holder of* divers weirs and hatches that had been erected at different times in, upon, or over certain rivers or streams in the county of Somerset, and also of a certain bank or piece of ground near or adjoining to one of the same rivers or streams, that is to say, a certain weir across a certain stream flowing from Lacombe Mill unto and through the several parishes of North Cheriton, Barrington, Maperton, and Temple Combe, within the levels of Horrington and Temple Combe, called *Marsh Mill weir*, and also certain hatches or frames across the said stream, called or known by the name of *Horse Croft hatches*: and also certain other hatches and frames across the said stream called *Ashen Tree hatches*: and also a certain other weir called *Bailward's weir*, across a certain stream called or known by the name of Tucker's Leaze Brook: *and also a certain share or shares or other right or interest in or to* three several other hatches and frames across a certain river or stream called or known by the name of the Wincanton river, and which last-mentioned three several hatches and frames are called or known by the names of *Stadium hatches*, *Well Mead hatches*, *and Perratt's hatches* respectively: *and also a certain bank or piece of ground near or adjoining to* a certain river or stream called or known by the name of *the New River*, and being on the South side of a certain field called or known by the name of Great Oxen Leaze, in a place called the Dean, or by whatsoever other names or descriptions or wheresoever else the same weirs, hatches, frames, and bank or ground are called, known, or situate respectively: that Dodington was proprietor or holder of divers lands and premises in the said county of Somerset, situate near or adjoining to the said several weirs, hatches, frames, and bank or ground so belonging to or held by Bailward as aforesaid, and near or adjoining to the said rivers or streams in, near, upon, or over which the same are respectively erected or situate, or

Dodington proprietor of adjoining land.

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some of them; and that the said lands and premises of Dodington, or some of them, were respectively called or known by the several names of Common Broad Moor, Broad Moor Piece, Catherine Mead, Great Oxen Leaze, Little Oxen Leaze, Tip Pool, Outer and Inner Withy Meads, Castle Hall More, Batch Pool, Bennett's Mead, Hundred Acres, and Oxen Leazes, or by some other names; that Dodington was also proprietor of a certain lane or piece of ground now or late occupied by Thomas Gear as his tenant; all which said several pieces of land, closes, lane, and premises were respectively situate in the parishes of Horsington and Wincanton, or one of them, or elsewhere in the said county of Somerset; that disputes and differences had at different times arisen, and then existed, between Dodington and Bailward in respect to the said weirs, hatches, bank, and premises, and certain damages alleged to have arisen therefrom; that, Dodington having complained of the said alleged damage or injury thereinbefore mentioned, the same was ex parte inquired into by jurors duly authorized, who, after hearing evidence on oath adduced on behalf of Dodington touching the matters alleged by him, made their presentment to the commissioners of sewers for the district or limit wherein the said several weirs, hatches, banks, lands, and premises were respectively situate, at a court held by the said commissioners on the 25th August, 1837; that the said court was adjourned to the 27th October then next ensuing, at which time Bailward wholly denied the truth of the matters alleged in the said presentment by pleading not guilty thereto, and thereupon such proceedings were had that the said matters were ready for trial at a court held by the commissioners of sewers for the said district or limit on the 5th January last (1838); that the said trial was then entered upon as to the matters contained in the said presentment, and, before all the matters in the said presentment had been tried and determined, it was agreed between Bailward and Doding-

Disputes had arisen between them.

Presentment before commissioners of sewers.

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ton that the bank in the Dean in the presentment mentioned should be taken down to the level of the Dean, and posts and rails should be erected in lieu thereof, the posts to be not less than twenty feet apart from each other, so that the same should not impede the course of the said river or stream called the New River; and it was at the same time further agreed that all matters then in dispute in the presentment between Dodington and Bailward should be referred to T. Davis and E. T. Percy, or their umpire, whom the arbitrators were to appoint on or before the 1st February then next; and the said arbitrators or their umpire were to say what should be done by Dodington and Bailward, or either of them, in any of the matters referred to them; and it was further agreed that the arbitrators or their umpire should have full authority to order and direct all or any works or other things to be done and maintained by Dodington and Bailward, or either of them, which they, the arbitrators or umpire, should deem proper or expedient, and also (if they or he should think fit) to order and direct that a proper and suitable fence should be made and kept in repair on the North Western side of the Great Oxen Leaze, and adjoining to the Oxen Leaze Road, and also any other work or thing which might be necessary for the regulation of the flood-waters flowing into Great Oxen Leaze aforesaid; and it was further agreed that each party should execute bonds of submission, to carry the said agreement into effect, on or before the 5th February then next: that the arbitrators, on the 26th January last, appointed J. B. Knight to be their umpire; and that Bailward had entered into the above-written bond or obligation in pursuance of the said agreement.

Agreement to refer.

Power of arbitrators or umpire.

Condition of bond of submission.

The condition of the bond was, that Bailward (152), his heirs, executors, or administrators, and every of them, should in all things on his and their parts and behalves

(152) The like bond was entered into by Dodington.

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well and truly stand to, obey, abide by, observe, and perform, fulfil, and keep the award, order, arbitrament, and final end, and determination, orders, and directions of the arbitrators of and concerning the premises so referred to them as aforesaid, so as such award or determination should be made in writing, under the hands of the arbitrators, and ready to be delivered to the parties or either of them, their or either of their executors or administrators respectively, in case he or they should request the same, on or before the 20th August, 1838, or such other or further day as the arbitrators should by writing under their hands in that behalf appoint; or, in case the arbitrators should not agree in their award, then that Bailward, his heirs, executors, and administrators, and every of them, should on his and their parts and behalves in all things well and truly stand to, abide by, observe, perform, fulfil, and keep the umpirage, order, arbitrament, final end and determination, order, and direction of Knight, so as such last-mentioned umpirage, order, or determination be made in writing under his hand and seal, ready to be delivered to the parties, or either of them, their or either of their executors or administrators (in case he or they should request the same) on or before the 20th September, 1838, or such other or further day as the said umpire should by writing under his hand in that behalf appoint; and that Bailward should appear before the arbitrators or umpire to give evidence when required, and should produce before them all evidence and writings concerning or in anywise relating to, or that might tend to explain, the matters in dispute, or any of them, which were or might be in his custody or power. And it was thereby (amongst other things) agreed, that the arbitrators or umpire should have full power or authority, if they or he should think proper, from time to time and at all convenient times until the said award or determination should be made, either by themselves or himself, or by any person or persons to be appointed by them or any of them for that pur-

Award to be made by the arbitrators on or before August 20, 1838,

by the umpire before the 20th September— each having power to enlarge the time.

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pose, to enter into and upon any lands or premises of Bailward and Dodington, or either of them, in order to see the state and condition thereof, and of the said weirs and hatches, or any other matters or things which might appear to them or him necessary, in order the better to judge of the said several matters in dispute; and that the costs and charges of the bond, and all costs, charges, and expenses of and attending or incidental to the arbitration or award, should be borne and paid by Bailward and Dodington jointly, or by either of them separately, as the arbitrators, or, in case of their disagreement, the umpire, should by their or his award or umpirage direct.

Enlargement of time by the arbitrators.

Davis and Percy duly entered upon the business of the reference, and proceeded to the examination of witnesses and other evidence adduced before them, but, not being able to make an award on or before the 20th August, 1838, in pursuance of the power given them by the submission, on the 14th August, by writing under their hands, duly enlarged the time for making their award until the 2nd October, and on the 28th September further enlarged the time for making their award until the 1st November; and, being unable to come to an agreement, they, in October, gave notice to the umpire that there was no probability of their making an award; whereupon the umpire, in pursuance of the power vested in him as umpire by the submission, and at the request of the arbitrators, entered upon the business of the reference, and prior to the 1st November, by writing under his hand, duly enlarged the time for making his award until the 1st December, and, on the 26th November, further enlarged the time for making his award until the 20th December.

Notice of non-agreement by them to the umpire.

Enlargement by the umpire.

Award.

The umpire, by his award, dated the 19th December, 1838—reciting as above, and that he had heard and deliberately considered the evidence adduced by each of the parties concerning the matters in difference, and had viewed and inspected the several weirs, hatches, banks,

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lands, and premises respecting which the said disputes and differences had arisen—awarded as follows:—

First—I do award, order, and direct that the weir, hatches, and frames which are standing across the aforesaid stream flowing from Lattiford Mill into and through the said several parishes of North Cheriton, Horsington, Maperton, and Temple Combe aforesaid, called respectively *Marsh Mill weir, Horse Croft hatches, and Ashen Tree hatches,* be prostrated, removed, and discontinued; and that the removal thereof shall be effectually accomplished and completed at the expense of Bailward, his heirs, executors, administrators, or assigns, before the 1st March next ensuing: and I do further award, order, and direct that the said weir, hatches, and frames so directed to be prostrated and removed, shall never again be re-erected or rebuilt by Bailward, his heirs, executors, administrators, or assigns; and that no other weir, hatch or hatches, frame or frames, shall hereafter be erected on or near to the site or respective sites thereof.

1. Marsh Mill weir, Horse Croft hatches, and Ashen Tree hatches, to be removed.

Secondly—I do award, order, and direct that the said weir called *Bailward's weir* now standing across the said stream called Tinker's Leaze Brook, shall and may stand, remain, and for ever hereafter be used and continued by Bailward, his heirs, executors, administrators, or assigns.

2. Bailward's weir to remain.

Thirdly—I do award, order, and direct that the said bank or piece of ground near to or adjoining the said river called the New River, and being on the Northern side of the said field called or known by the name of *Great Oxen Leaze,* in a place called the Dean, be taken down to the level of the Dean, and that posts and rails shall be erected in lieu of the said bank, and that the said posts shall not be erected less than twenty feet apart from each other, and that the opening between the said posts shall be furnished with swing flood-gates or stops, so as to afford a free passage for all floating matters in time of floods, and be a sufficient fence at all other times; and that a good

3. Bank in Great Oxen Leaze to be levelled, and posts and rails &c. erected.

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and substantial culvert of brick or stone, and not less than fourteen inches in diameter, be made through the base of the bank, from ditch to ditch on either side thereof, in such a manner as to drain the ditch on that side which belongs to Dodington; and that the hatch and frame at present standing in the Southern ditch adjoining the said New River, be forthwith removed: and the said works so as aforesaid by me ordered to be done shall be effectually accomplished and completed at the expense of Bailward, his heirs, executors, administrators, and assigns, before the said 1st March next (1839); and that the said bank and hatch and frame, and all other things so directed to be removed, shall never again be erected or restored by Bailward, his heirs, executors, administrators, or assigns; and that no other bank, hatch, or hatches shall hereafter be erected on the site or respective sites thereof; and that the said posts, rails, flood-gates, and culvert shall from time to time hereafter be repaired, kept up, and sustained by Bailward, his heirs, executors, administrators, or assigns.

4. Studham hatches, Perrott's hatches, and Wall Mead hatches to be removed.

Fourthly—I do award, order, and direct that the said hatches called Studham hatches, and Perrott's hatches, and Wall Mead hatches, and the respective frames thereof, shall be removed and discontinued, and that such removal of the same hatches and frames shall be effectually accomplished and completed before the 1st March next by and at the expense of Bailward, his heirs, executors, administrators, or assigns, and that the same shall never again be restored or rebuilt by Bailward, his heirs, executors, administrators, or assigns; and that no other hatches or frames shall hereafter be erected on or near to the site or respective sites thereof; *so as, nevertheless, that this my award with regard to the said last-mentioned hatches and frames called Wall Mead hatches shall only concern or relate to such part, share, right, interest, or control which Bailward, his heirs, executors, administrators, or assigns now hath or shall or may hereafter have therein, and not further or otherwise.*

Proviso.

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Fifthly—The umpire awarded that the costs of the bonds of submission, arbitration, umpirage, and award, should be borne and paid by the parties in equal shares.

5. Costs of the reference and award.

Lastly—he directed, that, upon the performance of the several matters and things thereinbefore directed and ordered to be done and performed, the parties should respectively, at the request and at the costs and charges of the party requiring the same, sign, seal, and deliver each unto the other of them mutual releases in writing of all and all manner of action, cause and causes of action, controversies, claims, and demands whatsoever touching or concerning the premises and the several matters so referred as aforesaid, from the beginning of the world to the day of the date of the said bonds or obligations thereinbefore recited.

6. Mutual releases.

The umpire had in fact (though it was not so stated in the award) enlarged the time for making his award before the 20th September, viz. on the 17th; and of this Bailward had (verbal) notice on the 18th April, 1839.

Wilde, Serjeant, in the last term, obtained a rule nisi for an attachment against Bailward for non-performance of this award.—The rule was founded upon affidavits stating that all the enlargements had been duly made as above stated; that, on the 20th December, 1838, Bailward was served with a copy of the award, and paid a moiety of the expenses of the reference; and that he had verbal notice on the 18th April, 1839, when performance of the award was demanded of him, that the umpire had on the 17th September, 1838, duly enlarged the time for making his award.

Sir *F. Pollock* and *Kinglake* now shewed cause.—The award in this case has not been made in such a manner as to entitle the party seeking to enforce the performance of it, to do so by attachment. Although it now appears that the time for making the award was in fact enlarged, no

1. Bailward had no notice of the enlargement by the umpire of the time for making his award.

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notice of such enlargement was served upon Bailward, and therefore he cannot be held to be in contempt. In *Davis* v. *Vass*, 15 East, 97, it was held, that, where an award appears to have been made out of the time originally given to the arbitrator by the rule of court, but which rule reserved to him the power of enlarging the time, it is not enough for obtaining an attachment for non-performance of the award, that the arbitrator states in his award that he had enlarged the time, without verifying the fact by affidavit; and it should also appear that the defendant had notice of such enlargement of the time within which the award was made, when served with the rule for the attachment. And the like was held in *Moule* v. *Stawell*, 15 East, 99, n. [*Erskine*, J.—Bailward was served with a copy of the award, which recites the fact of the enlargement, and he was informed, at the same time, when the enlargement took place. In *Davis* v. *Vass*, the fact was not brought before the court by affidavit at the time the attachment was moved for.] Lord Ellenborough there says: "The defendant has had no notice of his offence. He may have resisted payment of the sum awarded, under an idea that the award was not made within the time given by a proper enlargement of the authority: and therefore the plaintiff has not entitled himself to this attachment." Service of an award containing a recital that the time has been enlarged, amounts to no more than a notice that the arbitrator has so recited. In *Wohlenberg* v. *Lageman*, 6 Taunt. 254, this court decided in conformity with *Davis* v. *Vass*.

2. Enlargement by umpire not duly made.

According to the bond of submission, the award was to be made by the arbitrators on or before the 20th August, 1838, or by the umpire on or before the 20th September; each having power to enlarge the time. On the 14th August the arbitrators enlarged the time for making their award to the 2nd October, and again on the 28th September to the 1st November: so that, on the 28th September,

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the arbitrators were still dealing with the reference; and it was not until some time in October that they communicated to the umpire that there was no probability of their agreeing to an award. The umpire, on the 17th September, whilst the arbitrators were proceeding with the reference, and whilst it was yet uncertain that he would ever be called upon to act in the matter, enlarged the time for making his award to the 1st December; and, on the 26th November, further enlarged the time to the 20th December; before which last-mentioned day his award was published. The question is whether the court will enforce by attachment an award made under such circumstances. He who asks for the attachment ought to shew with certainty the offence he charges the party with—not by reasonable intendment or presumption, but by an exclusion of every presumption to the contrary.

3. As to the authority of the umpire.

Before the authority of the umpire could attach, the arbitrators must disagree—*Spriggens* v. *Nash*, 5 M. & S. 193. Here is no affidavit before the court that the arbitrators have disagreed: the only intimation of that fact is the recital in the award that the arbitrators had given notice to the umpire that they were not likely to agree. But that is not enough: the court should have had judicial knowledge of the fact by affidavit. And the disagreement of the arbitrators not having taken place until after the 20th September, the authority of the umpire was gone, or, rather, it never was called into existence. Two sets of persons cannot be acting in the reference together.

4. As to the exercise of that authority.

4. This is a reference of an exceedingly complicated and difficult nature, involving a great variety of particulars, and affecting the interests of many. The submission recites, among other things, that Bailward is proprietor of certain weirs and hatches: these, with one exception, the award directs him to remove. It further recites that he is proprietor of a certain share or shares, or other right or interest in or to three several other hatches, called

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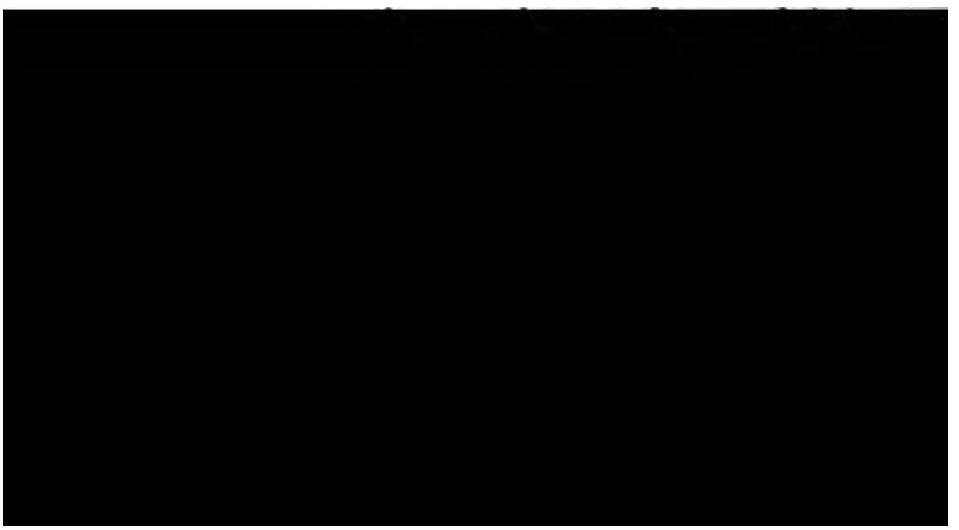
Studham hatches, Perrott's hatches, and Wall Mead hatches: these also the award direct shall be removed "by and at the expense of Bailward;" to do which he must necessarily be guilty of an act of trespass. Now, it is clear that the court will not enforce by attachment an award that is illegal on the face of it—*Macarthur* v. *Campbell*, 2 Ad. & E. 52, 4 N. & M. 208. [*Erskine*, J.—Did you ever know an award to be set aside for a mis-recital? *Wilde*, Serjeant.—In *Paull* v. *Paull*, 2 C. & M. 235, 4 Tyr. 72, 1 Dowl. 340, it was expressly decided that a mis-recital does not constitute an objection to the award on the face of it. *Alder* v. *Savill*, 5 Taunt. 454, is an authority to shew that an award directing a party to do that which may subject him to an action, is void. Heath, J., there says: "The power given to the arbitrator to determine what he should think fit to be done, must be confined to reasonable acts; as the making a tumbling bay on the lessor's land would be waste in the defendants [who were lessees]: we cannot permit them to be attached on the one side for doing that upon which they would on the other hand be sued for waste."

Wilde, Serjeant, *Bere*, and *Butt*, in support of the rule.—Upon shewing cause against a rule for an attach-



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has been enlarged, the fact of enlargement must, on moving for an attachment, appear to the court by affidavit, and it must also appear that the party to be charged with the award had notice of the enlargement. Here, the fact of enlargement does appear by affidavit, and it also appears that Bailward *had notice*, that is, *was informed*, of that fact at the time he was called on to perform the award. In the case of *In re Bower*, 1 B. & C. 264, it was expressly held that personal knowledge of an award and rule of court renders the party liable to an attachment for not performing the award, although he has not been personally served with such award and rule. If the party is shewn to have full knowledge of the duty that is cast upon him, it is matter of perfect indifference how such knowledge has been communicated to him. In *Barton* v. *Ranson*, 3 M. & Welsby, 322, by the terms of the submission the arbitrator had power to enlarge the time for making his award; the order of reference, on which there was an indorsement enlarging the time dated previously to the expiration of the time for making the award, was made a rule of court: and it was held that an attachment for non-performance of the award might be moved for without an affidavit that the enlargement was duly made.

2. Enlargement by umpire duly made.

2. The power of the umpire to enlarge the time for making his award before actual disagreement by the arbitrators was necessarily implied; it was essential to keep alive his authority. The argument on the other side seeks to engraft upon the submission a condition that would destroy the very obvious intention of the parties.

3. As to the authority of the arbitrator.

3. In *Spriggens* v. *Nash*, 5 M. & S. 193, upon a submission to two, and, in case they disagreed, to the umpirage of a third, so that the arbitrators made their award on or before a day certain, and the umpire, if they should differ, before a subsequent day; the umpire having made his award before the time given to the arbitrators expired, it was held that the umpirage need not state that the arbi-

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trators had disagreed. Lord Ellenborough, speaking of the argument urged against the validity of the award in that case, says: "The argument would have struck me very forcibly, if by law it were necessary for an arbitrator or umpire to deduce his authority strictly from regular premises upon the face of his award. But I take this not to be necessary. If, indeed, it appears negatively upon the face of an award that the arbitrator has not authority, as, if, in the present instance, it had appeared that the arbitrators had not disagreed, the case would be different; but the objection is not that the umpire has negatived his authority, but only that he has omitted to state it affirmatively. The umpirage is made within the time; but it has been laid down that the umpire may proceed by anticipation; and, if not intercepted by any act of the arbitrators, such an award would, I conceive, be good."

4. Authority of umpire well executed.

4. It is further contended that the court will not permit an attachment to issue in order to compel the performance of that which is well awarded, because the award embraces a matter which Bailward has no power to perform. The first answer to that argument is, that Bailward has not produced any affidavit to satisfy the court of his inability to do any part of that which the arbitrator has directed him to do. And, in the next place, the fact of his inability to perform one part of the award is no reason why he should not perform it as to the residue. In *Trew* v. *Burton*, 1 C. & M. 533, 3 Tyr. 559, arbitrators, having power to appoint an umpire, nominated one accordingly, who made his award, reciting his nomination by them, but misdescribing the Christain name of one of them; and it was held, that, as in an action on the award the recital of the appointment of the umpire would be unnecessary, the award remained in force, and an attachment lay to enforce it.

TINDAL, C. J.—It appears to me that the objections

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that have been made to the issuing an attachment in this case are well answered. The first objection is, that the several enlargements of the time for making the award were not properly communicated to Bailward. Undoubtedly, *Davis* v. *Vass*, 15 East, 97, and *Wholenberg* v. *Lageman*, 6 Taunt. 251, are authorities to shew, that, where arbitrators have power to enlarge the time for making their award, and have enlarged it, and made their award in the additional time, in order to bring the defendant into contempt for non-performance of the award, there must be an affidavit that the time has been enlarged, that the award was made within the enlarged time, and that the defendant has been personally served with notice of those facts. But no particular form of notice is pointed out: and, unless the verbal notice given in this case is sufficient, I do not see how we can stop short of holding that a copy must be served on the party and the original document shewn to him at the time. And the objection is considerably weakened by the circumstance of its not having been made a ground for moving to set aside the award in the term next after it was made. Besides, the verbal notice was received without demur. The case therefore seems to me to fall within that of *In re Bower*, 1 B. & C. 264, where it was held that personal knowledge of an award and rule of court makes the party liable to an attachment for not performing the award, although he has not been personally served with such award and rule.

1. Fact of enlargement of the time sufficiently communicated to Bailward.

The second objection is, that, to found a motion for an attachment for non-performance of this award, the fact of the disagreement of the arbitrators should have been communicated to the party, and judicially made known to the court; for that it was only in the event of the arbitrators disagreeing that the umpire could have authority either to make an award or to enlarge the time for making it. But the word "disagreement" as used in this submission, is synonymous with "non-agreement:" and it abundantly

2. Enlargement by umpire duly made.

[illegible]

[illegible]

[illegible]

[illegible]

The next question is, how the inquiry is to be made? It appears to have been the practice on the part of the authorities before the 25th September, in the return of the summonses, the authorities were to make their return on or before the 25th September, the return day on or before the 25th September, each being bound in writing under their respective hands to enlarge the time. The authorities finding that they could not make an award by the day appointed, on the 24th August enlarged the time for so doing until the 2nd December, and on the 25th September further enlarged the time until the 1st November, and the umpire, in order to enable him to enter on the discharge of the reference, on the 27th September enlarged the time for making his award to the 1st December, and on the 29th November made a further enlargement until the 31st December, before which day his award was published. It seems to me that this was a reasonable and proper mode of pursuing the power given to him by the submission.

§ As to the objection of the authority

The next objection is, that the umpire has improperly awarded to be done by Baliward that was neither out of the power of Baliward to perform, or beyond the authority of the umpire to direct viz. the removal of the hatches called Southam hatches, Perrott's hatches, and Wall Mead hatches. But it by no means sufficiently appears that it is out of Baliward's power to do that which the award directs: there is no affidavit to that effect before us. The award of submission recites that Baliward is the proprietor or owner of Marsh Mill weir, Horse Croft hatches, Ashen Tree hatches, and Baliward's weir: and that he is proprietor of a certain share or shares or other right or interest in or to three several other hatches, called Southam hatches, Perrott's hatches, and Wall Mead hatches. Of

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these three last-mentioned hatches, the umpire has taken upon himself to direct absolutely that the first two, viz., Studham hatches and Perrott's hatches, shall be removed by and at the expense of Bailward; and, as to Wall Mead hatches, that that also shall be removed by and at the expense of Bailward, but that the award so far as relates thereto shall only concern or relate to such part, share, right, interest, or control which he, Bailward, his heirs, executors, administrators, or assigns, then had or should or might thereafter have therein. It would seem that this qualification was introduced into the award for the express purpose of avoiding a direction to do anything that might render the party liable to an action of trespass. If it should turn out that Bailward cannot legally remove the hatches in question, that would be so far an answer to the performance of the award.

It therefore seems to me that in substance and effect all the objections to the award are answered, and that the attachment must go: but, of course, it will lie in the office a reasonable time.

Enlargement duly made and sufficiently notified to the party.

VAUGHAN, J.—The first question we are called upon in this case to consider, is, whether or not it sufficiently appears that the time for making the award was properly enlarged, and the fact of such enlargement duly communicated to Bailward. It appears by one of the affidavits that have been produced before us, that the umpire, on the 17th September, did enlarge the time for making his award. But it is said, that, inasmuch as the arbitrators had not then disagreed, the umpire had no authority so to enlarge the time. It appears to me, however, that such power is necessarily to be implied from the terms of the submission, in the event of the arbitrators not agreeing or being likely to agree before the day named for the umpire to make his award. It is then said that it did not appear that Bailward had any formal notice of such enlargement.

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But it is sworn that he was informed at the time he was called upon to perform the award, that the several enlargements had duly taken place. A written notice is not necessary: it is enough that knowledge of the fact is conveyed to the party. It is further objected that certain things are by the award directed to be done by Bailward that are out of his power to perform. Bailward, however, has made no affidavit upon the subject. Besides, if it be out of his power to perform some part of the award, that is no reason why he should abstain from the performance of those parts of it that are within his power. Upon the whole, I think there is no foundation for any of the objections, and that the attachment must go.

Award good.

COLTMAN, J.—I am of the same opinion. The only point upon which I have entertained doubt was, whether it was not necessary to serve a copy of the enlargement upon the parties; and, if any such practice had been found to have obtained, I must say I should have thought it not unreasonable. All, however, that the cases shew, is, that *some* notice must be given. As to the other points, which have been so fully gone into by the Lord Chief Justice, I entirely concur in the opinion he has pronounced.

As to notice of enlargement.

ERSKINE, J.—Three objections have been urged against the issuing of the attachment in this case — first, that the court have before them no legal evidence that the award has been duly made — secondly, that Bailward had no proper or sufficient notice of the enlargement of the time for the umpire to make his award — thirdly, that the umpire has exceeded his authority.

The first objection in effect resolves itself into two branches—1. that the umpire had no authority to enlarge the time as he has done—2. that there is no legal evidence before us, that, supposing him to have such authority, he has duly exercised it.

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1. The arbitrators were to make their award on or before the 20th August, 1838, or such other or further day as they should appoint; and it was provided, that, in case the arbitrators should not agree in their award, the duty of making an award should devolve upon the umpire, so as his umpirage or award should be made on or before the 20th September, or such other or further day as he should appoint. It appears by the recitals in the award, and by affidavit, that the time for the arbitrators to make their award was duly continued by enlargement until the 1st November; and that the umpire, in anticipation of the event that has happened, viz. the disagreement or non-agreement of the arbitrators, and that his powers would consequently come into requisition, in order to keep alive those powers, before the expiration of the time limited by the submission for him to make his award, enlarged the time. Inasmuch as the arbitrators had not agreed before the 20th September, it seems to me that an authority in the umpire to enlarge the time arises by necessary implication from the language of the submission. It has been contended that the umpire had no right to interfere in any way until he received notice of an actual and final disagreement of the arbitrators. I agree, however, in opinion with the Lord Chief Justice and the rest of the court, that such authority vested in the umpire upon the expiration of the time first fixed for the arbitrators to make their award; and that he was bound to step in for the purpose of keeping alive his authority, which would otherwise have expired on the 20th September. And it appears by the affidavits that have been filed, that he did actually enlarge the time on the 17th September.

1. Award duly made.

2. It is then urged that Bailward had no notice either of the disagreement of the arbitrators or of the fact of the time having been enlarged by the umpire before the 20th September. But he had notice of the disagreement of the arbitrators, by the production of the award by the umpire.

2. As to the notice of enlargement.

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With regard to the notice of enlargement, if it be necessary that such notice should be in writing, he certainly had none: neither does it appear upon the face of the award that the time had been enlarged by the umpire before the 20th September; the award merely stating, as to the first enlargement by the umpire, that it was made "prior to the 1st November," the day to which the arbitrators had enlarged the time. The cases to which our attention has been drawn upon this subject, hold, that, where arbitrators have power to enlarge the time for making their award, and have enlarged it, and made their award within the additional time, in order to bring a party into contempt for non-performance of the award, there must be an affidavit that the time has been enlarged, that the award was made within the enlarged time, and that the defendant has been *personally served with notice* of those facts. No form of notice, however, is suggested; and in a subsequent case (*In re Bower*, 1 B. & C. 264), it was held that *personal knowledge* of an award and rule of court renders the party liable to an attachment for not performing the award, although he has not been *personally served* with such award and rule. If, therefore, *notice in writing* was not necessary (and I think it was not), then it appears that Bailward had ample knowledge of the fact at the time he was called upon to perform the award, viz. the 18th April, 1839. And he seems then to have acquiesced; for, he has made no application to set aside the award. No authority having been cited to shew that a notice in writing was necessary, it appears to me that the case of *Ex parte Bower* will warrant us in holding that any intimation given to the party of the fact of enlargement, will suffice to render him liable to an attachment for not performing the award.

3. Umpire has not exceeded his authority.

3. It has been further contended that the umpire has exceeded his authority, in directing Bailward to do something that the submission shews it is not in his power to

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do. But, though as to that particular direction the award may be nugatory, the rest of the award is not necessarily vitiated. Had Bailward shewn to the court that he had performed the award as far as was in his power, that would have been a good answer to the rule.

Upon the whole, I think the rule for the attachment must be made absolute, and that the proper course will be, to let the attachment lie in the office one month, and then issue unless cause be shewn to the contrary to the satisfaction of a judge at chambers.

Rule absolute accordingly.

ABBOTT *v.* W. S. BRUERE the Younger.

Wednesday, June 5th.

The grantor of an annuity, notwithstanding his discharge under the insolvent debtors act, is liable to his surety for payments made on account of the annuity subsequently to the discharge, though due before.

THIS was an action of covenant. The declaration stated, that, by an indenture of the 11th August, 1831, made between the defendant of the one part, and the plaintiff of the other part—in which was recited a grant of the same date of an annuity from the defendant to one George Powell of 52*l.* per annum, and also that the plaintiff had covenanted in such grant to guarantee to the said George Powell the due payment of the said annuity, and to indemnify the said George Powell against loss, costs, charges, or expenses which he might be put to by reason of the defendant not peforming the conditions of a certain policy of assurance on the life of the said defendant—the defendant covenanted with the plaintiff that he the defendant would pay the said annuity of 52*l.* at the times it became payable, and would save harmless and keep indemnified the plaintiff against all loss by reason of his becoming guarantee: Breach, that the defendant did not pay the annuity, but that, on the 11th August, 1835, 26*l.*, for half a year's annuity, became in arrear, which the plaintiff was compelled

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to pay, and that the defendant had not repaid nor kept th plaintiff indemnified from the same.

Pleas—1. Payment. 2. That defendant had been discharged under the insolvent debtors act. 3. Set off.

The defendant pleaded—first, payment of the sum o 26*l.* to the plaintiff—secondly, that, by an order of the 8t March, 1836, made by the court for the relief of insolven debtors in England, he, the defendant, then being an in solvent debtor in custody, was duly discharged of and fron the said covenant and cause of action in the declaratio mentioned—thirdly a set-off.

Replication.

The plaintiff replied—to the first plea, that the defend ant did not pay modo et formâ—to the second, that th defendant was not discharged from the covenant and caus of action, modo et formâ—to the third, nil debet.

The cause was tried at the Middlesex Sittings in Easte Term, 1837, before Vaughan, J., when a verdict was entere for the plaintiff, subject to the opinion of this court upo the following case:—

Settlement of June 13, 1826.

By a deed of settlement, bearing date the 13th June 1826, the defendant, being at the time of the age of twenty one years, under certain trusts therein contained, becam entitled to an annuity of 400*l.* during the life of his grand father, who died in January, 1836; and which annuity wa payable by half-yearly payments on the 24th June an 25th December, in every year: after whose decease, tha annuity ceased. And under the same trusts the defendan was entitled to another annuity of 600*l.* per annum, pay able by half-yearly payments to the defendant, during th life of his father, on the 24th June and 25th December i every year; with a reversion to him of a considerable in come upon his father's death. Trustees were named i the settlement, to carry the trusts into execution.

Grant of annuity to Powell.

In August, 1831, the defendant being in treaty with on George Powell for the loan of 499*l.*, to be secured by a annuity of 52*l.*, the plaintiff became surety for the defend ant for the payment of the annuity; and accordingly, b indenture of the 11th August, 1831, made between th

Defendant surety.

defendant of the first part, George Powell of the second part, and the plaintiff of the third part (the deed declared on)—reciting, inter alia, that the defendant had contracted with the said George Powell for the sale to him of an annuity of 52*l.*, to be secured by an assignment of an annuity of 600*l.* to which the defendant was entitled by a certain conveyance therein mentioned, and also by the covenant of the plaintiff—it was witnessed, that, in consideration of 499*l.*, the defendant did grant unto the said George Powell one annuity of 52*l.*, for the term of ninety-nine years, payable as therein mentioned, To hold the same for ninety-nine years; and it was further witnessed, that, for the considerations aforesaid, the defendant did grant and assign unto the said George Powell all that annuity of 600*l.* which by indenture of settlement of the 13th June, 1826, was directed to be paid, in case William Bruere, the grandfather, should die during the joint lives of W. S. Bruere the elder and the defendant, to the defendant and his assigns, thenceforth during the joint lives of the said W. S. Bruere the elder and the defendant, and all future payments thereof, and all powers, &c., To hold, receive, and take the said annuity of 600*l.*, and all and singular other the premises thereby assigned, unto the said George Powell, his executors, administrators, and assigns (subject to the then existing incumbrances), upon trust, until the defendant should make default in payment of the said annuity of 52*l.*, to pay the said annuity of 600*l.* to the defendant; and, from and after such default, upon trust that the said George Powell, his executors, administrators, or assigns, should, out of the said annuity of 600*l.*, when the same should become payable, retain and pay himself the said annuity of 52*l.* as and when the same should become payable, and also from time to time thereout repay unto the plaintiff, his executors, administrators, and assigns, all such sum and sums of money as he should have paid unto the said George Powell, his executors, administrators, and

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assigns, for the said annuity of 52*l.*, pursuant to or in c charge of the covenant of the plaintiff thereinafter c tained. Then followed, inter alia, a covenant on the p of the plaintiff to pay the said annuity of 52*l.*, and all ditional premiums of insurance, in case the same sho enure.

Deed of covenant declared on.

On the same day, the defendant executed the deed covenant upon which this action is brought, and deposi with the plaintiff 52*l.*, for the payment of the first yea annuity.

Payments on account of Powell's annuity.

The plaintiff had regularly paid the annuity to Pow down to the 11th August, 1835; and there was then d and unpaid from the defendant to the plaintiff the sum 156*l.* in respect of the said payments over and beyond t said retained sum of 52*l.*, which was applied to the fi year's payment of the said annuity; and the said sum 156*l.*, together with other sums, was included in the s of 1,171*l.* 14*s.* 2*d.* mentioned in the defendant's sched hereafter referred to.

Defendant discharged under the insolvent debtors act.

In March, 1836, the defendant, being a prisoner, pe tioned the court of insolvent debtors for relief, and, havi given the plaintiff due notice according to the insolv debtors act then in force, was discharged under the s act, by an order of the court bearing date the 8th day March, 1836.

[The special case then set forth a portion of the defe ant's schedule filed in the insolvent debtors court, conta ing a statement of a debt of 1,171*l.* 14*s.* 2*d.* due to t plaintiff, and a detailed account of all the defendant's tra actions as far as they affected the plaintiff.]

Payment by the plaintiff of 26*l.*, half a year's annuity.

After the discharge of the defendant under the insolv debtors act, that is to say, on the 12th April, 1836, t plaintiff paid Powell 26*l.*, being the half-yearly payment the annuity which had become due on the 11th Augu 1835, to recover which sum of 26*l.* so paid to Powell t present action was brought.

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In the beginning of 1836, by his grandfather's decease, the defendant became entitled to the before-mentioned annuity of 600*l.*, the first half-yearly payment of which became due on the 24th June, 1836. Besides the 52*l.* paid at the time of the execution of the said grant of the annuity, the plaintiff had not received any other sum of money on account thereof from the defendant. But, after the annuity of 600*l.* became payable, the plaintiff applied for payment to him of any arrears thereof, under the assignment, and upon the trust contained in the above-mentioned grant of annuity to Powell, of the 11th August, 1831. On the 7th January, 1837, he received from the trustees under the settlement of W. S. Bruere, 64*l.* 12*s.* 1*d.*, being the balance in their hands of the annuity thereby secured to the defendant.

Money received by plaintiff from the trustees of the settlement.

The defendant by his particulars of set-off sought to set off this sum of 64*l.* 12*s.* 1*d.* so paid by the trustees, and which sum exceeds the amount sought to be recovered in this action, but falls short of the sum of 156*l.* so paid by the plaintiff on account of Powell's annuity as aforesaid.

Claim of set off.

The question for the opinion of the court was—whether or not the discharge under the insolvent debtors act, or the payment of the sum of 64*l.* 12*s.* 1*d.*, afforded an answer to the action (and the court were to draw any inference of fact the jury might draw); and, if so, the verdict to be entered accordingly.

Question.

W. H. Watson, for the plaintiff.—The facts are shortly these:—The defendant grants to Powell an annuity of 52*l.* per annum, the plaintiff joining in the deed as a surety; by a deed of the same date with the grant of the annuity, the defendant covenants to pay the annuity and to save the plaintiff (the surety) harmless from all claims in respect thereof; 26*l.*, half a year's annuity, being in arrear, the defendant (the grantor) obtains his discharge under the insolvent debtors act, and the plaintiff (the surety) is after-

1. Defendant not relieved from the claim of his surety.

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wards called upon and compelled to pay that sum: and the question is, whether the discharge of the principal antecedently to the damnification of the surety operates a discharge of the liability of the former under his covenant with the latter. The point is not a new one: it has already been decided in this court, in *Powell* v. *Eason*, 8 Bing. 23, 1 M. & Scott, 68, and *Hocken* v. *Brown*, 4 New Cases, 400, 6 Scott, 194. In *Powell* v. *Eason*, it was held that one who is discharged under the insolvent debtors act, 7 Geo. 4, c. 57, is not exonerated from the claim of a surety on a promissory note, which became due before the insolvent presented his petition, but which the surety was not called on by the creditor to pay until after the discharge of the principal. And Tindal, C. J., says: "The 10th section (153) authorizes the prisoner to petition the insolvent debtors court to be discharged from custody, and to have future liberty of his person *against the demands for which the prisoner shall be then in custody*, and against the demands of all other persons who shall be or claim to be creditors of such prisoner *at the time of presenting such petition*. And the 46th section (154) enacts 'that it shall be lawful for the court to adjudge the prisoner to be discharged from custody as to the several debts and sums of money due or claimed to be due *at the time of filing such prisoner's petition*.' Was, then, the plaintiff a creditor of the defendant at the time of presenting or filing his petition? The plaintiff was then only a surety for the payment of a promissory note due from the defendant to Mary Bell. There was no debt as between the plaintiff and the defendant, and consequently the plaintiff was not a creditor of the defendant at the time of his discharge, and therefore he does not fall within the words or meaning of either of those clauses of the

(153) Re-enacted by the 1 & 2 Vict. c. 110, s. 35.

(154) Re-enacted by the 1 & 2 Vict. c. 110, s. 75.

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act." So, here, at the time of the defendant's discharge, there was no debt due from him to the plaintiff. And in *Hocken* v. *Brown* it was held that the discharge of the grantor of an annuity under the act does not (by s. 51) release one who had as surety for the grantor executed a joint and several warrant of attorney to secure the instalments of an annuity; and the court intimated an opinion that the grantor was not discharged from liability to his surety for payments made by the latter in respect of the annuity subsequently to the grantor's discharge under the act: Tindal, C. J., saying (6 Scott, 201)—" Here the principal has already been discharged. It has been urged, on behalf of the plaintiff, that, if we hold the surety not to be relieved from his responsibility, the principal will still be liable in a circuitous manner, there being no express provision in the insolvent debtors act, as there is in the 6 Geo. 4, c. 16 (155), for preventing the surety from afterwards resorting to the principal, when he shall have been called upon to make good the future accruing quarterly payments. It may be so. But, when we see that there is an express provision in the 6 Geo. 4, c. 16, to enable the surety to put himself in the place of the annuity-creditor, and receive dividends in respect of the proof made by him, and that the statute now in question, though passed in the very next session, contains no provision of the sort, we must suppose the omission to have been not unintentional, and cannot supply a machinery which the legislature has not thought fit to give."

2. As to the alleged payment.

With regard to the 64*l.* 12*s.* 1*d.* received by the plaintiff in January, 1837, from the trustees of the settlement under which the defendant became entitled to the annuity of 600*l.* per annum, there having been no specific appropriation of it by either party, the law would appropriate it towards the discharge of the earlier debt—*Mills* v. *Fowkes*,

(155) See the section, 52, set out, ante, p. 726, note 148.

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5 New Cases, 455, 7 Scott, 444, and the cases there cited—viz. the 156*l.* due to the plaintiff in respect of the payments made by him on account of Powell's annuity; and consequently there is no pretence for the set-off claimed. And there was no payment by the defendant.

1. Defendant discharged.

R. V. Richards, for the defendant.—*Powell* v. *Eason* is wholly inapplicable: it was not the case of an annuity. And *Hocken* v. *Brown* is distinguishable, in this, that there the quarterly payment of the annuity became due *after* the discharge of the principal; here, though the payment was made *after* the defendant's discharge, the annuity became due *before* that event. Besides, the question as to the liability of the principal to recoup his surety did not arise in that case: the remarks of the court upon that point were mere obiter dicta; all that it was necessary to determine there, was, whether or not the 51st section of the 7 Geo. 4, c. 57, (156) discharged the surety as well as the grantor. If the plaintiff here had, as he was bound to do, paid the annuity when it became due, his claim against the defendant in respect of such payment, as well as that of Powell, the grantee, would have been barred: and he cannot be permitted to take advantage of his own laches in order to place himself in a better situation than he would otherwise have been in.

2. Payment.

The payment by the trustees was in substance a payment by the defendant: and there having been no appropriation by either party, the law will ascribe the payment to the debt for which the plaintiff had a legal remedy, in preference to that his remedy for which was only equitable—*Birch* v. *Tebbutt*, 2 Stark. 74; *Goddard* v. *Hodges*, 1 C. & M. 33, 3 Tyr. 259 (157).

(156) Re-enacted by the 1 & 2 Vict. c. 110, s. 80.

(157) The contrary was held in Bosanquet v. Wray, 6 Taunt. 597, 2 Marsh. 319, the authority of which was recognized by this court in Mills v. Fowkes, 5 New Cases, 455, 7 Scott, 444. And see Philpott v.

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TINDAL, C. J.—It is, I think, impossible to distinguish this case in principle from *Hocken* v. *Brown*, although there the payment in respect of which the action was brought became due after the discharge of the grantor of the annuity, and here before; for, it does not follow that the plaintiff had any notice of the annuity being in arrear before the defendant obtained his discharge.

1. Case governed by *Hocken* v. *Brown*.

As to the second point—It is enough to look at the terms of the indenture of the 11th August, 1831, to see how the money payable to the defendant under the settlement of June, 1826, is to be applied. The defendant thereby assigned to Powell the annuity of 600*l.* payable to him under that settlement, "upon trust, until the defendant should make default in payment of the said annuity of 52*l.*, to pay the said annuity of 600*l.* to the defendant; and, from and after such default, upon trust that the said George Powell, his executors, administrators, and assigns, should, out of the said annuity of 600*l.*, when the same should become payable, retain and pay himself the said annuity of 52*l.* as and when the same should become payable, and also from time to time thereout repay unto the plaintiff, his executors, administrators, and assigns, all such sum and sums of money as he should have paid unto the said George Powell, his executors, administrators, and assigns, for the said annuity of 52*l.*, pursuant to or in discharge of the covenant of the plaintiff thereinafter contained." The 64*l.* 12*s.* 1*d.* was not a payment made by the defendant, and therefore the question of appropriation cannot arise. It appears that various payments were from time to time made to the plaintiff, some before and some since the in-

2. Payment.

Jones, 2 Ad. & E. 41, where there were two debts, the one a legal debt, the other a debt which the plaintiff was by the statute 24 Geo. 2, c. 40, s. 12, precluded from recovering; and it was held that the creditor had a right to appropriate payments made generally on account in discharge of that debt which the statute prevented his suing for.

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solvency of the defendant. These, according to the tru above referred to, would be applicable from time to tim in discharge of the payments as made by the plaintiff o account of Powell's annuity. The half-yearly payment fi the recovery of which the present action is brought is n covered by any payment so made to the plaintiff; and co sequently the plaintiff is entitled to the verdict.

Debt not discharged.

VAUGHAN, J.—In *Cowley* v. *Russell*, 4 Taunt. 460, it wa held that the surety of the grantor of an annuity who ha obtained his discharge under the 51 Geo. 3, c. 125, wa not thereby released from his responsibility; and in *Pay* v. *Russell*, 2 M. & S. 551, it was held that the grantor though discharged under that statute, was still liable to h surety for arrears of the annuity accruing after his di charge, which the surety had been obliged to pay. Th language of the 7 Geo. 4, c. 57, s. 51, seems to me to b decisive. We cannot afford the party a protection th legislature have thought fit to withhold from him.

COLTMAN, J.—I am also of opinion that the plaintiff entitled to the verdict. The argument urged by the de fendant's counsel, that the plaintiff is seeking to take ad vantage of his own wrong in not having paid the annuit when it became due, is fallacious. As between the partie it is the principal, and not the surety, that is guilty of th wrong in omitting to make the payments as they becom due. I am unable to distinguish the case in principle fro *Powell* v. *Eason* and *Hocken* v. *Brown*.—With respect t the other point, it seems to me that the language of th deed precludes all doubt.

Debt not discharged.

ERSKINE, J.—I am of the same opinion. At the tim of the defendant's petition and discharge, the sum soug to be recovered in this action was not a debt in respect which the plaintiff could then claim to be a creditor und

the 51st section of the 7 Geo. 4, c. 57; and therefore it is not a debt from which the defendant is discharged by the adjudication of the commissioners.—Then, the payment in question was not a payment by the defendant, but a payment made pursuant to the trusts contained in the deed.

Judgment for the plaintiff.

DEACON and Others, Executrix and Executors of FRANCIS DEACON, deceased, *v.* STODHART and Others.

Wednesday, June 5th.

ASSUMPSIT on a bill of exchange. The declaration stated that one Edward Andrews, in the lifetime of Francis Deacon, since deceased, on the 30th November, 1836, made his certain bill of exchange in writing, and directed the same to the defendants, and thereby required them to pay to the said Edward Andrews or order 150*l.*, for value received, three months after the date thereof, which period had elapsed before the commencement of the suit; and the defendants then accepted the said bill; and the said Edward Andrews then indorsed the said bill to the said Francis Deacon, since deceased; of which the defendants then had notice, and then promised the said Francis Deacon in his lifetime to pay him the amount of the said bill according to the tenor and effect thereof, and of their said acceptance: yet the defendants had disregarded their said promise, and had not, nor had any of them, paid the said sum of money in the said plea mentioned, or any part thereof, to the said Francis Deacon in his lifetime, or to the plaintiffs executors as aforesaid, since the death of the said Francis Deacon.

The defendants pleaded—thirdly, that they accepted the said bill in the said first count mentioned, payable at their bankers', that is to say, at Messrs. Weston & Co.'s, bankers; that, after the making of the said promise in the

To a count against the acceptor of a bill of exchange, the defendants pleaded that they accepted the bill payable at their bankers', that, when the bill became due, it was duly presented at the bankers', who then honored and paid the same according to the usage and custom of merchants in that behalf; and further, that the bankers afterwards lost the bill, and it came to the plaintiffs' hands without value or consideration:—Held, that the first allegation was an informal allegation of payment, and bad for uncertainty; and that the plea was also bad for duplicity.

Payment.

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first count in the said declaration mentioned, and befor
the commencement of the suit, to wit, on the 3rd March
1838, when the said bill became due and payable, the sai
bill of exchange was duly presented for payment at th
the said Messrs. Weston & Co.'s, and the said Messr
Weston & Co., when the said bill was so presented f
payment, *duly paid the same, and then paid the amount
the said bill of exchange,* to wit, 150*l.*, according to t
tenor and effect thereof, and according to the defendan
promise in that behalf in the said first count mention
*and then honored and paid the said bill according to
usage and custom of merchants* in that behalf, and the s
bill was then delivered to the said Messrs. Weston & C
the defendants' bankers, on payment thereof by them
said Messrs. Weston & Co.; that the said Messrs. West
& Co., at the time of the said acceptance of the said bill
the defendants, thence until and at the time of the s
payment of the said bill, and thence hitherto, were
had been and still were the bankers of the defendants,
kept a banking account with them the defendants,
the said Messrs. Weston & Co., at the time of the said p
ment of the said bill, and afterwards, to wit, on the said
March, 1838, *debited the defendants in account with them
amount of the said bill of exchange;* that afterwards, to

That the bill

[redacted]

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To this plea the plaintiffs demurred specially; assigning for causes (amongst others)—that the defendants had in and by their said plea vexatiously and improperly attempted to set up several and distinct answers to the said action; to wit, that the said bill was duly paid on the defendants' part when it became due, and also that the said bill was lost after it became due, and that the plaintiffs were subsequent holders without value or consideration—that the plea was uncertain and ambiguous, in this, to wit, that it did not clearly or sufficiently appear in and by the same plea for and on whose account the said payment was made, and, if the same was to be taken as a payment by or on account of the defendants, then the same should have been directly so pleaded, whereas the same appeared by way of inference and conclusion from the facts alleged; and if, on the other hand, the said payment was not to be taken as a payment by or on account of the defendants, then the same was a fact wholly irrelevant and immaterial, any averment of which was unnecessary and improper, and tended to embarrass and perplex the plaintiffs, and occasion useless prolixity and expense.

Special demurrer.

The defendants joined in demurrer.

Joinder.

The points marked for argument on the part of the plaintiffs, were as follow:—That the plea presented a double answer to the count, viz. first, that the bill was duly paid on behalf of the defendants (the acceptors), and so that it was no longer negotiable—secondly, that it was lost after it became due, and came to the plaintiffs' possession without value.

Points marked for argument.

Petersdorff, in support of the demurrer.—The plea in question discloses two distinct answers to the action—the one that the bill was duly paid by the acceptors, in which case its negotiable character would be destroyed; *Beck* v. *Robley*, 1 H. Blac. 89, n., *Hubbard* v. *Jackson*, 1 M. & P. 11, 4 Bing. 390—the other, that, after the bill had been

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so paid, the bankers of the defendants casually lost it, and the bill came to the possession of the plaintiffs without any value or consideration: and the plaintiffs could not traverse one of these without admitting the other; and he could not put the whole in issue by replying de injuriâ, the matter pleaded not being mere matter of excuse—*Crisp* v. *Griffiths*, 2 C. M. & R. 159, 5 Tyr. 619, 3 Dowl. 753. It is perfectly consistent with the allegations in the plea, that the bill was paid by Deacon, the testator, for his own honor. [*Tindal*, C. J.—Taking the whole of it together the allegation seems to point at a payment in the ordinary course of business by the acceptor. If the fact were so the plaintiffs might have replied specially that the money was provided by the testator. Where there is a good answer in fact, it is always matter of wonder to me that pleaders should prefer speculating upon nice points of law.]

Hoggins, contrà.—The whole of the facts stated in the plea amount to but one defence, viz. that the plaintiffs were not bonâ fide holders of the bill for value; and the whole might have been put in issue by a replication properly framed—*Isaac* v. *Farrar*, 1 M. & Welsby, 65. The declaration states that Deacon (the testator) was the *holder*

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TINDAL, C. J.—It appears to me that the plea in question is bad, upon two grounds: either the first allegation is to be taken as an allegation of payment of the bill by the acceptor according to the usage and custom of merchant, and then the plea will be bad for duplicity; or it will be bad for uncertainty. Taking it to amount to a good allegation of payment, that alone is a complete answer, for, the holder would have no right to sue for it a second time. The plea, however, goes on to allege, that, after the bill had been so paid, the bankers of the defendants casually lost it, and the bill came to the possession of the plaintiffs without any value or consideration. That, if true, affords another very good defence to the action: and therefore the plea is bad for duplicity. On the other hand, the plea is so cautiously worded in the first part as to leave it uncertain whether the payment was made by the defendant himself, or for the honor of the drawer: and therefore it would clearly be bad for uncertainty.

VAUGHAN, J.—I am also of opinion that this plea is obnoxious to the twofold charge of duplicity and uncertainty.

COLTMAN, J.—It appears to me that the plea is bad on the ground specifically pointed out by the demurrer—that it is "uncertain and ambiguous, in this, to wit, that it does not clearly or sufficiently appear in and by the same plea for and on whose account the said payment was made; and, if the same is to be taken as a payment by or on account of the defendants, then the same should have been directly so pleaded; whereas the same only appears by way of inference and conclusion from the facts alleged." If it be meant by the plea that the payment by the bankers was made by them as agents for the defendants, then it amounts to an answer to the action; and, if this is not the meaning, then it is perfectly consistent with the alle-

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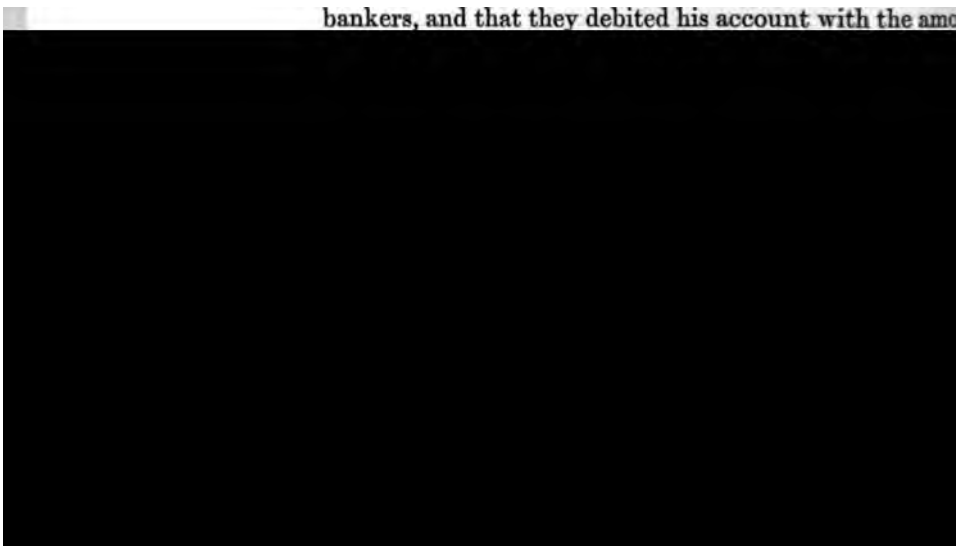
gation that the payment was made for the honor of som other party. The plea alleges, that, when the bill w presented for payment, the bankers "honored and pa the said bill according to the usage and custom of me chants in that behalf." A payment for the honor of party is a payment according to the usage and custom merchants. The plea certainly goes on to state that t bankers debited the defendants with the amount of the l in account with them: but it does not follow that this w done by their authority or with their assent. If the p ment was in fact made by or on account of the defe ants, they should have distinctly averred so.—The ot part of the plea also contains matter that of itself wo amount to an answer, and therefore the plea is bad for plicity. And according to *Stevens* v. *Underwood*, 6 Sc 402, 4 New Cases, 655, a plea containing two distinct fences is not the less a double plea because one of defences is badly pleaded.

ERSKINE, J.—I am of opinion that this plea is bad u both grounds. The plea states that the bill was pay at Weston & Co.'s; and the allegation in the earlier p of it is, not that the defendants paid the bill, but tha was paid by Weston & Co, that they were the defenda bankers, and that they debited his account with the amo



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Saturday, June 8th.

DOE *d.* EMENY *v.* ROE.

In an ejectment, the landlord has no right to appear until a rule for judgment against the casual ejector has been obtained.

ESPINASSE, for Sayer, the landlord, moved for a rule calling upon the lessor of the plaintiff to shew cause why the Master should not review his taxation of costs in this case. The declaration was served before Hilary Term last. Judgment against the casual ejector was never moved for; notwithstanding which the landlord appeared, and took out a summons for particulars of the premises. No further proceedings were taken; and a second ejectment was afterwards brought. The defendant obtained an order to stay the proceedings in the second ejectment until the costs of the first were paid. The Master refused to allow the defendant any costs, on the ground that his appearance before a rule for judgment against the casual ejector had been obtained, was premature.

PER CURIAM.—The defendant was not called upon to appear until a rule for judgment against the casual ejector had been obtained. He should have searched the book kept in the Masters' office for the purpose of entering such judgments; and, until he found the judgment there entered, he had no right to appear.

Espinasse took nothing (158).

(158) See Doe d. Kerr v. Roe, ante, p. 701.

Saturday, June 8th.

GRAHAM and Others *v.* MUSSON.

A contract for the sale of goods was, in the presence and at the desire of the buyer, written and signed by the seller's traveller in a book belonging to the former, as follows:—"Of North & Co., 30 Mats Maur^{s}. Cash two months. Joseph Dyson:"—Held, that this was not a sufficient note or memorandum of the bargain to satisfy the 17th section of the statute of frauds—Dyson not appearing to be authorized to sign it *as agent for the buyer.*

The authority of an agent to sign such a contract need not be in writing.

THIS was an action of assumpsit for goods sold and delivered. The defendant pleaded—first, non assumpsit—

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secondly, the want of a note or memorandum in writin under the statute of frauds, and that there was no accep ance of the goods. The plaintiffs replied that there w such note or memorandum. The cause came on to b tried at the London Sittings after Michaelmas Term, 183 before Tindal, C. J., when a verdict was taken for t plaintiffs for 132*l.* 9*s.* 9*d.*, subject to the opinion of t court on the following case:—

The plaintiffs were wholesale grocers residing in Lond On the 19th August, 1836, the plaintiffs' traveller, Jose Dyson, called on the defendant, who was a grocer at Gai borough, and on their account sold him thirty mats sugar, to be sent to Fenning's wharf, which was a wh on the Thames.

At the time of the sale, Dyson, in the presence and the desire of the defendant, made and signed an entr the contract of the said sale in a book of the defend then produced for that purpose to Dyson by the defend This book was produced by the defendant at the trial; the following is a copy of the said entry in the handwri of Dyson:—

Contract.

"Of North & Co. 30 Mats Maur[s] at 71*s.* Cash months. Fenning's wharf. Aug. 19, 1836.

"Joseph Dyson.

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Crompton, for the plaintiffs.—The memorandum in question was a sufficient memorandum to charge the defendant, within the 17th section of the statute of frauds (159); and the circumstance of Dyson, the party who signed it, being the plaintiffs' traveller, does not disqualify him from being competent to sign the contract as the defendant's agent. The object of the statute was that the terms of the contract should be evidenced by writing: and in this respect the statute is complied with. In the case of contracts made by brokers and auctioneers, the broker or the auctioneer is the common agent of both buyer and seller. In *Wright* v. *Dannah*, 2 Camp. 203, Lord Ellenborough held that the agent who signed the memorandum must be a third person, and not one of the contracting parties; and in *Farebrother* v. *Simmons*, 5 B. & A. 333, Abbott, C. J., referring to *Wright* v. *Dannah*, held that an auctioneer's signature was not sufficient, where he sued as one of the parties to the contract. But much doubt is thrown upon those cases by that of *Bird* v. *Boulter*, 4 B. & Ad. 443, 1 N. & M. 313. There, in assumpsit by an auctioneer against a purchaser for goods sold, an entry in the sale book by the auctioneer's clerk, who attended the sale, and, as each lot was knocked down, named the purchaser aloud, and, on a sign of assent from him, made a note accordingly in the book, was held to be a memorandum in writing by an agent lawfully authorized, within the 17th section of the statute of frauds; for, the clerk is not identified with the auctioneer, and, in the business which he performs, of entering the names, &c., he is impliedly authorized by the

(159) 29 Car. 2, c. 3—the 17th section of which enacts "That no contract for the sale of any goods, wares, and merchandizes, for the price of 10*l.* or upwards, shall be allowed to be good, except the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the said bargain be made and signed by the parties to be charged by such contracts, *or their agents thereunto lawfully authorized.*"

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persons attending the sale to be their agent. Littl dale, J., there says: "With respect to the cases reli upon in support of the rule (160), there is certainly a dif culty in saying that a purchaser shall be bound by a co tract or not, as the action is brought by one party another. It is, indeed, irregular that the real buyer real seller should make the other party his agent to sign memorandum under the statute; but when that is dor through a third person the objection is removed." Th present case is even stronger than that; for, it is expressl stated that the entry was made by Dyson "in the pr sence and at the desire of the defendant:" Dyson there fore was clearly constituted the defendant's agent. *Simo* v. *Motivos*, 3 Burr. 1921, *Rucker* v. *Commeyer*, 1 Esp. 10 *Hinde* v. *Whitehouse*, 7 East, 558, and *Hawes* v. *Foste* 1 M. & Rob. 358, are authorities to shew that the auctionee or broker who makes a contract, is the agent of bot parties, so as to bind the purchaser by his signature: an there can be no objection in reason and good sense wh the same individual should not be the agent of both partie in the transaction. In *Phillimore* v. *Barry*, 1 Camp. 51 Lord Ellenborough held that the initials of the defend ants' agent written by the auctioneer in the catalogue coupled with a letter written by them recognizing the sale constituted a sufficient memorandum in writing to satisf the statute of frauds; and in *White* v. *Proctor*, 4 Taunt, 20 it was held that the auctioneer's writing down the nam of the highest bidder in his book is a sufficient signatur to satisfy the statute. In *Wilson* v. *Hart*, 7 Taunt. 295, i was held that the statute does not exclude parol evidenc that a written contract for the sale of goods, purporting t be made between A., the seller, and B., the buyer, was o B.'s part made by him only as agent for C. In *Kenworth*

(160) Wright v. Dannah, 2 Camp. 203, and Farebrother v. Simmons 5 B. & A. 333.

v. *Schofield*, 4 D. & R. 556, 2 B. & C. 945, Bayley, J., says: "There are many cases in which it has been held, that, in sales by auction of lands, the auctioneer is the agent both of the seller and the purchaser, and that contracts so made are within the provision of the statute of frauds, because the auctioneer signs them as the agent of both:" citing *White* v. *Proctor*, 4 Taunt. 209, *Kemeys* v. *Proctor*, 3 Ves. & B. 57, *Walker* v. *Constable*, 1 B. & P. 306, and *Emerson* v. *Heelis*, 2 Taunt. 38. In *Allen* v. *Bennet*, 3 Taunt. 169, Sir James Mansfield says: "*Egerton* v. *Mathews*, 6 East, 307, *Saunderson* v. *Jackson*, 2 B. & P. 238, and *Champion* v. *Plummer*, 1 N. R. 252, suppose a signature by the seller to be sufficient, and every one knows it is the daily practice of the court of Chancery to establish contracts signed by one person only, and yet a court of Equity can no more dispense with the statute of frauds than a court of Law can." And in *Hicks* v. *Hankin*, 4 Esp. 114, where the plaintiff sued upon the following contract—"Sold Mr. George Hankin 320 quarters of Hicks's malt, at 74*s*. (Signed) J. Taylor"—on its being objected for the defendant that the statute of frauds, in order to establish a valid contract, required the note to be in writing, and signed by the parties or their agents lawfully authorized; that it was in evidence that Taylor was employed by Hicks, the plaintiff, by whom he was paid; that he was the agent therefore of the plaintiff only, and, as he only had signed the sale-note, the statute was not satisfied by such signing—Heath, J., said "it was sufficient, as Taylor was the agent of both parties in making the contract, and that his signing was therefore valid."

Wightman, for the defendant.—The position contended for on the part of the plaintiffs, which amounts to this—that parol evidence is admissible to shew that the party signing the contract is the agent of the party to be charged—would open a door to all the mischief which it

[illegible]

[illegible] *writing.* See the argument deduced from this by Tindal C. J., in Hyde v. Johnson, 2 Scott, 289, 2 New Cases, 776.

purchase of flour by the defendant of the plaintiff, a miller, taken by the plaintiff's rider, in his common order book, in these terms—"19th Feb. 1811, of John Smith, 64*l.*" (which was explained by the witness to mean so much received of the defendant in satisfaction of a former order): "Ditto, 40 of 3—58*s.*" (which was explained to mean a new order for forty sacks of flour called thirds, at 58*s.* per sack); and this, without any signature, was held not to be a sufficient memorandum in writing of the bargain within the statute of frauds, to bind the defendant; though it was *read over to him by his desire at the time it was written.* In *Bird* v. *Boulter*, the name of the defendant was written in the sale book; and in *Phillimore* v. *Barry*, the whole was in writing. No case has yet decided that the name of the party to be charged may be introduced by parol.

Crompton, in reply.—It is perfectly competent to shew by parol evidence that the person by whom the contract is made is contracting on behalf of another—*Kemble* v. *Atkins*, 7 Taunt. 260; *Wilson* v. *Hurt*, 7 Taunt. 295; *Hicks* v. *Hankin*, 4 Esp. 114; *Short* v. *Spackman*, 2 B. & Ad. 962. In *Sims* v. *Bond*, 5 B. & Ad. 389, 2 N. & M. 608, Lord Denman says: "It is a well-established rule of law, that, where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant in the latter case being entitled to be placed in the same situation, at the time of the disclosure of the real principal, as if the agent had been the contracting party." And the same learned judge, in delivering the judgment of the court in *Jones* v. *Littledale*, 6 Ad. & E. 486, 1 N. & P. 677, says: "There is no doubt that evidence is admissible, on behalf of one of the contracting parties, to shew that the other was agent only, though contracting in his own name, and so to fix the real principal." In *Cooper* v. *Smith*, the

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entry was in the *plaintiff's* book, and was not, as he made at the defendant's desire.

TINDAL, C. J.—The question is, whether or not the m set out in this special case is a note or memorandum writing of the bargain signed by the parties to be charg or their agents thereunto lawfully authorised, to satis the 17th section of the statute of frauds. Upon the be consideration that I am able to bring to bear upon th statute and the several authorities that have been referr to, I am of opinion that it is not. The form of the m morandum is this:—"Of North & Co. (meaning, 'boug of North & Co.,' the plaintiffs' firm), 30 mats Mauritiu at 71*s.*, cash two months. Fenning's Wharf—Josep Dyson." The first objection to this contract is, that does not disclose the names of the two contracting partie and therefore the case falls within that of *Champion* v *Plummer*, 2 N. R. 252, where it was held that a note o memorandum in writing of a contract for the sale of good signed by the seller only, is not a sufficient memorandu within the meaning of the statute of frauds. The answe attempted to be made to this objection is, that the nam of Joseph Dyson being at the bottom of the note, it mu be taken that he was the agent authorised by the defend ant to sign the contract on his behalf. If such had bee the evidence in this case, I am far from saying, upon th authority of the cases upon that point to which our atten tion has been invited, that such a consequence would no follow: for, any parol authority given by the party to b charged to sign on his behalf, would satisfy the statute But, here Dyson does not sign the name of Musson (th defendant): all that appears is the name of Dyson; an there is no evidence whatever that Dyson (who was th plaintiffs' traveller) had any authority to sign as the de fendant's agent. The parties present at the time the con

Parol authority to an agent to sign the contract, sufficient.

tract was entered into, were, Dyson, representing the plaintiffs, and Musson, the defendant. The statement in the case relating to the transaction, is this:—"At the time of the sale, Dyson, in the presence, and at the desire of the defendant, made and signed an entry of the contract of the said sale in a book of the defendant, then produced for that purpose to Dyson by the defendant." This evidences no authority given by the defendant, that he, the plaintiffs' agent, should also represent the buyer. The entry was merely made with a view to prevent mistake at a future period as to the terms of the contract. It is unnecessary to determine on the present occasion how far parol evidence is admissible to shew the authority of the agent to sign the contract; for, here, there was no evidence of agency at all. *Bird* v. *Boulter* has no application. There, the names of the two contracting parties did appear. It was there held that the auctioneer's clerk putting down the name of the buyer in the sale book with his assent, was his agent for the purpose of charging him with the contract. But that is not this case. I am of opinion that the exceptions out of the statute should not be rashly extended.

VAUGHAN, J.—I am of the same opinion. The 17th section of the statute of frauds requires that a contract of this description be evidenced by some note or memorandum in writing "signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized:" and the only question here is whether or not this memorandum is signed by an agent for that purpose authorized by the defendant. In order to determine that question, it will not be necessary to impugn any of the cases that have been commented on at the bar: for, the plaintiffs' case fails at the outset, inasmuch as there is no evidence to shew that Dyson was the defendant's agent in the transaction. Looking at the statement in the

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special case, I see nothing to warrant us in inferring a such agency: nor do I think it probable, Dyson being t plaintiffs' traveller, that he was authorized to sign an thing on behalf of the defendant to charge him; t design of the defendant evidently being to obtain such memorandum as would enable him to call on the plainti to perform the contract. That an agent need not authorized *in writing*, was ruled by Lord Eldon in *Coles Trecothick*, 9 Ves. 250.

Agent need not be authorized in writing.

COLTMAN, J.—I am of the same opinion. It is not d sirable that the provisions of the statute of frauds shou be relaxed: the intention of the legislature was, to pr vide as much as possible against the possibility of frau and perjury. I am not prepared to say that the mem randum would have been sufficient to satisfy the statut even if Dyson had been the defendant's clerk. Bu Dyson was in no respect the agent of the defendan Undoubtedly he might have had a special authority t contract for the defendant. Had that been the case her and the name of "Musson" subscribed to the memora dum by Dyson, without any expression of dissent b Musson, the case would have been brought very near t that of *Bird* v. *Boulter*, 4 B. & Ad. 443, 1 N. & M. 31 upon which the plaintiffs mainly rely. But here Dyso simply signs his own name to an entry he makes in th defendant's book at the defendant's request. To hol such a signature to be sufficient to charge the defendant would, I think, be too wide a departure from the word and intention of the statute, and an unreasonable exten sion of the principle of *Bird* v. *Boulter*.

ERSKINE, J.—I am of the same opinion. The only question is, whether or not Dyson acted as the agent o Musson in the making of this contract. If Dyson were in the employ of the defendant, such employment might

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involve an authority to sign contracts of this description for him; or, if the defendant had specially authorized Dyson to sign the particular contract for him, that possibly might have sufficed to charge the defendant. But there is no evidence whatever to shew that Dyson had any such authority: on the contrary, it sufficiently appears that he signed the contract as the agent and on behalf of his employers, the plaintiffs.

Judgment of nonsuit (161).

(161) In Dalison v. Stack, 4 Esp. 163, where it was objected that parol testimony could not be given of a contract of which a memorandum had at the time of the sale been made in a book kept by the vendor's traveller, but not signed by the vendee, Lord Ellenborough said "that he thought the witness might be allowed to give parol evidence of the contract, and that the memorandum was not necessary to be produced. This was not the case of a sale-note, or contract made by a broker, who acted between the parties, and who made the memorandum as agent to both, and as containing the terms of the contract; in which case the memorandum ought to be produced: but this was the act of the witness, as a servant of the plaintiff, to assist his memory; and was not *signed by the party:* it was therefore not necessary to produce it."

THE GAS LIGHT AND COKE COMPANY *v.* TURNER.

Monday, June 10th.

A court of law will not lend its aid to enforce the performance of a contract between parties, which appears, upon the face of the record, to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land.

In covenant for non-payment of rent, the defendant pleaded that the indenture was made between the plaintiffs and himself, and the premises demised by them to him, *for the express purpose* of being used for and applied by the defendant to a use prohibited under a penalty by the building act, 25 Geo. 3, c. 77:—Held, that the plea was a good answer to the action.

THE first count of the declaration stated, that, on the 13th August, 1833, by a certain indenture sealed with the common seal of the plaintiffs, and then made between the plaintiffs of the one part, and the defendant and one William Shackell and Benjamin Hopkinson of the other part—profert of the counterpart—the plaintiffs demised, leased, set, and to farm let unto the defendant and the said W. Shackell and B. Hopkinson, their executors,

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administrators, and assigns, certain tenements and pr
mises, with the appurtenances, particularly mentioned a
described in the said indenture—habendum for twent
one years, at the yearly rent of 300*l.* The count th
set out a covenant on the part of the defendant, his hei
executors, and administrators, for payment of the re
and a proviso for determining the term at the end of t
first seven or fourteen years; and averred, that, by virt
of that demise, the defendant and the said William Shac
ell and B. Hopkinson entered into and upon the demis
premises, and became and were possessed thereof for t
said term so to them thereof granted, which said term w
still subsisting and undetermined: performance by plai
tiffs: Breach—that, after the making of the said inde
ture, and during the term thereby granted, and duri
the first seven years of the said term, to wit, on the 13
February, 1838, a large sum of money, to wit, 75*l.* of t
rent aforesaid, for one quarter of a year of the said ter
ending on the day and year last aforesaid, and then la
elapsed, became and was due and still was in arrear an
unpaid to the plaintiffs, contrary to the tenor and effec
true intent, and meaning of the said indenture, and
the said covenant of the defendant so by him in th
behalf made as aforesaid.

Second count.

The second count stated, that, on the said 13th Augus
1833, by a certain agreement indented and then mad
between the plaintiffs of the one part and the defendan
and the said W. Shackell and B. Hopkinson of the othe
part—profert—after reciting, that, by an indenture bea
ing even date with the said agreement, and made betwee
the plaintiffs of one part and the defendant, the said W
Shackell, and the said B. Hopkinson of the other pa
(being the said indenture in the first count thereinbefor
mentioned), the plaintiffs had demised unto the defendan
and the said W. Shackell and B. Hopkinson, their exe
cutors, administrators, and assigns, the tenements and pre

mises, with the appurtenances, thereinbefore referred to, for the said term of twenty-one years, determinable as thereinbefore mentioned, commencing from the day of the date thereof, at and under the yearly rent of 300*l.*, and subject to the covenants and agreements in the said indenture reserved and contained; and that *it had been agreed* by and between the plaintiffs and the defendant and the said W. Shackell and B. Hopkinson, that they, the defendant, and the said W. Shackell, and B. Hopkinson should enter into the covenants and agreements thereinafter contained; the defendant did thereby, for himself, his heirs, executors, and administrators, covenant and agree with and to the plaintiffs, their succcssors and assigns, amongst other things, as follows, that is to say—That the defendant and the said W. Shackell and B. Hopkinson, or some or one of them, their or some or one of their executors, administrators, or assigns, would purchase and take of and from the plaintiffs at least 100,000 gallons of tar yearly and every year *during the said term of twenty-one years, determinable as aforesaid*, and pay the plaintiffs or their succesors for the same at and after the rate of 1*d.* per gallon, and that such tar should be received and taken by the defendant and the said W. Shackell and B. Hopkinson, their executors, administrators, or assigns, at some or one of the stations or works of the plaintiffs, in such quantities and proportions as might be fairly and reasonably required, and that, previous to requiring a delivery of any tar, the defendant and the said W. Shackell and B. Hopkinson, their executors, administrators, or assigns, should give a certain notice. Averment, that the term of twenty-one years in the agreement mentioned was still subsisting and undetermined of and in the tenements and premises, with the appurtenances, therein mentioned and referred to—performance by plaintiffs—Breach, that, although the plaintiffs, after the making of the agreement, and during the first year of the said term of twenty-one years in the

Covenant that the defendant would purchase of the plaintiffs 100,000 gallons of tar yearly.

Breach.

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said agreement mentioned, were ready and willing to se to the defendant and the said W. Shackell and B. Hop kinson the full quantity of 100,000 gallons of tar, at th rate in the said agreement in that behalf mentioned, an to deliver the same to the defendant and the said W Shackell and B. Hopkinson at some or one of the station or works of the plaintiffs in the said agreement referred to in such quantities and proportions as might be fairly an reasonably required pursuant to the said agreement i that behalf, whereof the defendant and the said W. Shackel and B. Hopkinson during all that time had notice; and although they the plaintiffs oftentimes during the sai first year of the said term of twenty-one years requeste the defendant and the said W. Shackell and B. Hopkinso to purchase, accept, and receive such full quantity o 100,000 gallons of tar, according to their said covenan in that behalf, &c.: yet the defendant and the said W Shackell and B. Hopkinson did not nor would, nor did no would any or either of them, during the said first year o the said term of twenty-one years, purchase or take of o from the plaintiffs the said full quantity of 100,000 gallon of tar, or pay the plaintiffs for the same at the rate and i the manner in the said agreement in that behalf men tioned. But, on the contrary thereof, took of and from the plaintiffs 95,910 gallons, and refused to purchas or take or pay for the residue. [There was a second breach, alleging, that in the third year of the term 97,120 gallons only were taken; and a third, that, in th fourth year, 50,758 gallons only were taken]: by means whereof the plaintiffs were put to expenses, and compelled to provide warehouse-room for the surplus.

Plea to the first count.

The defendant pleaded—First (to the first count), that the indenture in that count mentioned was made after the making and passing of a certain act of parliament made and passed in the 25 Geo. 3, [c. 77], intituled, &c., by which said statute, after reciting as therein is recited, it

was, amongst other things, enacted, that, from and after the 1st August, 1785, it should not be lawful for any person or persons within that part of Great Britain called England, to distil or boil any turpentine or tar, or to draw any oil of turpentine and rosin by distilling turpentine, or to draw any oil of tar or pitch, by distilling or boiling tar, or to boil any oil and turpentine together, or to boil any oil and tar together, above the quantity of ten gallons at one time of all or any of the said commodities in any workhouse or place contiguous to any other building, or in any place nearer to any other building than the distance of seventy-five feet at the least (except in houses and buildings then in use for carrying on such manufactories, and then legally entitled to be used for those purposes), *upon pain that every person offending therein should for every such offence forfeit and pay the sum of* 100*l.*; that the said tenements and premises, with the appurtenances, in the indenture in the said first count mentioned were not, before or at the time of the making and passing of the said act, in use for carrying on any such manufactories, and were not then legally entitled to be used for those purposes or any of them; that, at the time of the sealing and making of the said indenture in the said first count mentioned, and from thence continually hitherto, the said tenements and premises, with the appurtenances, were situate and being in that part of Great Britain called England, and were each and all of them workhouses and places contiguous to other buildings, and in places nearer to other buildings than the distance of seventy-five feet; that the said indenture was made and entered into by and between the plaintiffs and the defendant and the said W. Shackell and B. Hopkinson in manner and form as in the said first count of the declaration mentioned; and the said tenements and premises with the appurtenances in the first count mentioned, were demised to the defendant and the said W. Shackell and B. Hopkinson *for the express*

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purpose of being used for and applied to the drawing oil of tar or pitch by distilling and boiling tar, and of boiling oil and tar together, by the defendant and the said W. Shackell and B. Hopkinson in larger quantities than the quantity of ten gallons at one time of the said commodities respectively, contrary to the form of the said statute, whereby the said indenture was and is wholly void in law—verification.

Plea to the second count.

To the second count, the defendant pleaded—that the agreement made and indented as in that count mentioned, was made and entered into by and between the plaintiffs and the defendant and the said William Shackell and B. Hopkinson, after the making and passing of the said act of parliament in the said first plea mentioned and in the introductory part of that plea recited; and that the tar and every part thereof in that agreement mentioned was to be supplied by the plaintiffs and sold to the defendant and the said W. Shackell and B. Hopkinson, *for the express purpose of being distilled and boiled in and upon the tenements and premises with the appurtenances in the first plea mentioned and by the indenture in the said first count mentioned demised to the defendant* and the said W. Shackell and B. Hopkinson, above the quantity of ten gallons at one time, contrary to the form of the said statute in the said first plea mentioned; by means whereof and by force of the statute, the said agreement was and is wholly void in law—verification.

Demurrer to the first plea.

To these pleas the plaintiffs demurred specially; assigning for causes, as to the first—that it did not distinctly appear, nor was it alleged by the plea, that the plaintiffs, at the time of the making of the said indenture in the first count mentioned, were cognizant of the purpose for which the lessees intended to use the said demised premises, and that no collateral agreement or otherwise was alleged by the said plea to have been made by the plaintiffs and the said lessees that the said demised premises, or any part thereof, should be used for the purpose

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in the said plea mentioned—that there was nothing alleged in the said plea to shew that the said lessees were obliged to use the said demised premises, or any part thereof, for the purpose mentioned in the said plea; and that, by virtue of the said lease, the said lessees were entitled to use the same premises for any purpose whatever—that an estate for twenty-one years passed to the said lessees, and had not been and could not be divested out of them by any purposes to which they may have chosen to devote the said demised premises—that the said act of parliament in the said plea mentioned, did not render the said lease invalid—and that it did not appear in and by the said indenture that the said premises were demised for the pur pose in the said plea in that behalf mentioned.

Demurrer to the second plea.

As to the second plea, the causes of demurrer assigned were—that it was not alleged in or by that plea that the plaintiffs were cognizant of the purpose therein mentioned; that no such purpose appeared to have been expressed in or by the agreement in the last count mentioned; and that, if any collateral agreement to that effect existed, it ought to have been set forth with precision in the plea, in order that the court might judge how far the plaintiffs were implicated in the said alleged purpose—that the agreement in the last count mentioned was an executory agreement, and the lessees were bound to receive the quantities of tar therein mentioned and apply them to innocent and lawful purposes—that the lessees were not bound by the said agreement or otherwise to consume the said tar otherwise than in a lawful manner—that the lessees might, if they pleased, boil the said tar in quantities of less than ten gallons at one time, or might resell the said tar, and were not bound to violate the provisions of the said act—that the said last plea was argumentative and incomplete, in not precisely following the words of the said act, and in not precisely shewing the situation of the premises therein mentioned, or the structure or posi-

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tion thereof—and that it did not appear in and by the said agreement indented, that the said tar was to be supplied by the plaintiffs, and sold as in the said plea mentioned, for the purpose in the said plea mentioned.

Joinder. The defendant joined in demurrer.

R. V. Richards, in support of the demurrer.—The statute referred to in the pleas prohibits under a penalty acts therein specified, but does not, as do the mortmain act (9 Geo. 2, c. 36) and the statutes relating to simony (31 Eliz. c. 6, s. 5) and usury (12 Anne, st. 2, c. 16,) avoid any deeds or securities which may have been executed or entered into in violation of its provisions. If the plea be upheld, the consequence will be, that the defendant will be entitled to retain possession of the premises for the period mentioned in the lease without paying any rent. In Co. Litt. 206. b., it is said: "It is commonly holden, that, if the condition of a bond &c. be against law, the bond itself is void. But, herein the law distinguisheth between a condition against law for the doing of any act that is malum in se, and a condition against law (which concerneth not anything that is malum in se) but that therefore is against law, because it is either repugnant to some state or against some maxim or rule in law. And this

[redacted]

named would use the premises in the manner contemplated. Would a ship-builder be precluded from recovering the price of a vessel built by him for the purpose of being used as a smuggler, the original intention of the purchaser having been subsequently abandoned, and the vessel embarked in lawful trade? All the cases that are to be found in the books, are cases of executed contracts, where the illegality was in the contract itself, and the individual seeking to enforce it was not only cognizant of but party to the illegality. As in *Little* v. *Poole*, 1 B. & C. 192, where a vendor of coals who had delivered to the purchaser a ticket not signed by the meter pursuant to the statute 47 Geo. 3, sess. 2, c. 68, s. 113, was held to be disabled to sue for their price. So, in *Law* v. *Hodson*, 11 East, 300, where the seller of bricks under the statutable size was held to be without remedy for their value; and in *Bensley* v. *Bignold*, 5 B. & A. 335, where it was held that a printer could not recover for labour or materials used in printing a work to which he had omitted to affix his name pursuant to the 39 Geo. 3, c. 79, s. 27; Bayley, J., saying—"A party cannot be permitted in a court of law to recover for work and labour done in direct violation of the law." Again, in *Langton* v. *Hughes*, 1 M. & S. 593, where the sale to the defendants of drugs which the plaintiffs knew were intended to be used in the defendant's brewery, in violation of the 42 Geo. 3, c. 38, s. 20, was held to be a contract on which the plaintiffs could not sue; and in *Cannan* v. *Bryce*, 3 B. & A. 179, where money lent with an express understanding that it was to be applied by the borrower in the payment of differences on illegal stock-jobbing transactions, was held not to be recoverable back by the lender. So, in *Holman* v. *Johnson*, Cowp. 341, and *Clugas* v. *Penaluna*, 4 T. R. 466, the plaintiff was not allowed to recover the price of goods sold by him for the express purpose of their being smuggled into this country. In each of these cases, the contract which the plaintiff

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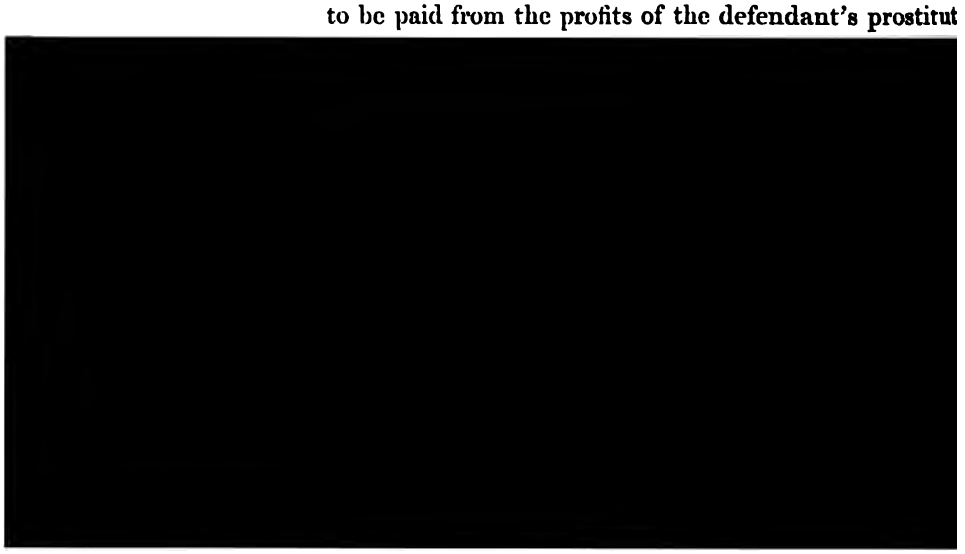
sought to enforce was a contract expressly made in breach of the respective statutes; but, here, the illegality form no part of the agreement, and, for anything that appear no illegality has ever yet been committed; the consump tion of the tar on the premises was no part of the contrac In *Armstrong* v. *Lewis*, 4 M. & Scott, 1, 2 C. & M. 27 A. and B. carried on the business of a pawnbroker i partnership under a deed; the business was conducte solely by A., and his name only appeared over the sh door and upon the printed tickets and duplicates used persons in that trade, and the licence contained the na of A. only: and the court seem to have thought, th although the parties might by this contract have rende themselves liable to penalties imposed by the stat 39 & 40 Geo. 3, c. 99, yet that, there being no act agreement for an infraction of the law, the contract not void. In *Bowry* v. *Bennett*, 1 Camp. 348, where assumpsit for the value of wearing apparel, the defence up was that the defendant was a prostitute, that this known to the plaintiff, and that the clothes in ques were for the purpose of enabling the defendant to p tise; Lord Ellenborough said, "it must not only be sh that the plaintiff had notice of this, but that he expe to be paid from the profits of the defendant's prostitut



to do an act that is prohibited by law. Here it appears that the premises in question were demised, and the contract entered into, with an express view to the violation of an act of parliament. For the purpose of determining the present question, it is perfectly immaterial whether the term passed or not: but there can be little doubt, that, the demise being absolutely void, the lessors might recover the premises by ejectment, inasmuch as they would not be enforcing an illegal contract. It is true, that parol evidence is not admissible to vary the terms of a contract under seal; but it is competent to a party against whom the contract is sought to be enforced to shew that it was entered into in furtherance of an illegal agreement—*Collins* v. *Blantern*, 2 Wils. 341. There, to debt on bond for 700*l.*, the defendant pleaded, that, before and at the time of making the bond, and the note after mentioned, two of the obligors, J. and T. Walker, and three others, stood indicted by John Rudge on five indictments for wilful and corrupt perjury, and had severally pleaded not guilty before the making the bond and note; that the several traverses on the indictments were, at the time of making the unlawful agreement after mentioned, and the note and bond, viz. on the same day the bond was made, about to come on to be tried at Stafford; whereupon it was corruptly agreed between Rudge, the prosecutor, the plaintiff, and the five persons indicted, that the plaintiff should give Rudge his note for 350*l.* in consideration for not appearing to give evidence at the trial of the said traverses, and that the obligors should execute the bond to the plaintiff of the same date with the note, as an indemnity to the plaintiff for giving such note; that the plaintiff gave Rudge the note for 350*l.* for not appearing as prosecutor and giving evidence; and that the obligors, on giving the note, executed the bond declared on as an indemnity to the plaintiff for giving such note: and this plea was held good on demurrer. Wilmot, C. J., in delivering the judgment of

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the court, said: "We are all of opinion that the bond void ab initio, by the common law, by the civil law, mo law, and all laws whatever; and it is so held by all writ whatsoever upon this subject, except in one passage in Gr tius, lib. 2, cap. 11, sect. 9, where I think he is greatly m taken, and differs from Puffendorf, lib. 3, cap. 8, sect. who, in my opinion, convicts the doctrine of Grotius. Justin. Instit. lib. 3, tit. 20, De Turpi Causa, sect. 23- Quod turpi ex causa promissum est, veluti si quis hom cidium vel sacrilegium se facturum promittat, non val And Vinnius, in his commentary, carries it so far as to s you shall not stipulate or promise to pay money to a m not to do a crime—Si quis pecuniam promiserit, ne furtu aut cædem faceret, aut sub conditione, si non fecerit, s huc dicendum, stipulationem nullius esse momenti; cu hoc ipsum flagitiosum est, pecuniam pacisci quo flagit abstineas. Dig. lib. 1, tit. 5. Code, lib. 4, tit. 7, to th same point. This is a contract to tempt a man to tran gress the law, to do that which is injurious to the commu nity; it is void by the common law, and the reason wh the common law says such contracts are void, is for th public good. *You shall not stipulate for iniquity*; all writer upon our law agree in this, no polluted hand shall touc the pure fountains of justice; whoever is a party to a unlawful contract, if he hath once paid the money stipu lated to be paid in pursuance thereof, he shall not hav the help of a court to fetch it back again: you shall no have a right of action when you come into a court of jus tice in this unclean manner to recover it back. Procu O! procul este profani. See Doct. & St. fo. 12, and chap 24." The authority of that case is expressly recognized i *Paxton* v. *Popham*, 9 East, 408, where, to debt on bon conditioned for the payment of a sum of money which th condition stated to have been taken up, borrowed, an received by the defendants of the plaintiffs at respondenti interest, secured by a cargo of goods shipped from Calcutt

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to Ostend; it was held to be competent to the defendant to plead that the bond was given to secure the price of goods sold by the plaintiffs to the defendants in the East Indies, and illegally prepared by the plaintiffs for shipment from thence to beyond the Cape of Good Hope, without the license of the East India Company. Here, the pleas shew that the covenants and the contract were entered into in direct violation of the statute: and, that the court will look only to the intention of the parties at the time of contracting, is clear from *Langton* v. *Hughes* and other cases. The court will not give effect to a contract which has for its object an infraction of the law. An action will lie upon the 2 Geo. 2, c. 24, for bribery at an election, even though the person bribed does not vote for the party he was bribed to vote for, but for his opponent—*Sulston* v. *Norton*, 3 Burr. 1235, 1 W. Blac. 317. In *Cope* v. *Rowlands*, 2 M. & Welsby, 149, the principle is thus stated by Parke, B., in delivering the judgment of the court: "It is perfectly settled, that, where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear that a contract is void if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition: Lord Holt, *Bartlett* v. *Vinor*, Carthew, 252 [Skinner, 322]. And it may be safely laid down, notwithstanding some dicta apparently to the contrary, that, if *the contract* be rendered illegal, it can make no difference, in point of law, whether the statute which makes it so has in view the protection of the revenue, or any other object. The sole question is, whether the statute *means to prohibit the contract.*" And this doctrine is followed out by this court in *Fergusson* v. *Norman*, 5 New Cases, 76, 6 Scott, 794, and by Lord Brougham, C., in *Armstrong* v. *Armstrong*, 3 Mylne & K. 45.

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R. V. Richards, in reply.—*Doe* d. *Roberts* v. *Roberts*, B. & A. 367, and *Lord* v. *Wardle*, 3 New Cases, 680, Scott, 402, shew, that, notwithstanding the illegal agreement, the lease would remain a valid lease; so that, even supposing that a mere intention to do an illegal act (for which, however, no authority has been or can be cited would taint the whole transaction with illegality, if the premises had been burned down immediately after the execution of the lease, so that the illegal intention could not be carried into effect, the defendant would still be entitled to hold the land without paying any rent. And according to *Frontin* v. *Small*, 2 Lord Raym. 1418, you cannot avoid the contract without avoiding the covenant *Soulston* v. *Norton*, turned upon the peculiar language of the statute 2 Geo. 2, c. 24, s. 7. Here the pleas do not state that the doing the illegal act was *a part of the agreement*, and therefore they do not properly raise the question

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—

First count. This is an action of covenant, in which the plaintiffs declare in the first count upon the covenant for payment of rent contained in a lease made by the plaintiffs to the defendant and two other persons, for twenty-one years from the 13th August, 1833, of certain premises therein described and in the second count the plaintiffs declare upon an agreement under seal, bearing date the same day and year as the lease, and made between the same parties as those between whom the lease is made, by which agreement, after reciting the said lease, the defendant covenanted that he would purchase of the plaintiffs at least 100,000 gallons of tar yearly, to be paid for and to be deliverable at the places and in the manner and proportions specified in the said agreement; and then proceeds to assign three breaches on the said agreement.

Plea thereto. The defendant pleads, in answer to the first count, that

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the indenture therein mentioned was made after the passing of the statute 25 Geo. 3, c. 77, by which it was enacted that it should not be lawful for any person to distil or boil any turpentine or tar, &c., above the quantity of ten gallons at one time, in any workhouse or place contiguous to any other building, or in any place nearer to any other building than the distance of seventy-five feet at the least (with an exception the application of which to this case is negatived by the plea), upon pain of forfeiting for every such offence 100*l.* And the plea then proceeds to aver, that the said tenements and premises were and are contiguous to other buildings, and in places nearer to other buildings than the distance of seventy-five feet, "and that the said indenture was made and entered into by and between the plaintiffs and the defendant and the other two persons in manner and form as in the said first count mentioned, and the said tenements and premises with the appurtenances were demised to the said defendant and the said two other persons, *for the express purpose* of being used and applied to the boiling of oil and tar together, &c., by the said defendant and the two other persons, in larger quantities than the quantity of ten gallons at one time of the said commodities respectively, *contrary to the form of the said statute,* whereby the said indenture was and is wholly void in law."

To this plea the plaintiffs have demurred in law. And it becomes unnecessary to advert to the second count, and the plea thereto, as the point raised upon it by demurrer must necessarily be governed by the decision upon the first count.

Covenant void.

The objection that has been urged on the part of the defendant, is, that this is an action founded upon a contract, and that a court of law will not lend its aid to enforce the performance of a contract between parties, which appears upon the face of the record to have been entered into by both the contracting parties for the express pur-

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pose of carrying into effect that which is prohibited by law of the land. And we think, both upon authority reason, this objection must be allowed to prevail. T no legal distinction can be supported between the appli tion of this objection to parol contracts and to contra under seal, appears the necessary inference from the ca of *Collins* v. *Blantern*, 2 Wils. 346, and *Paxton* v. *Popl* 9 East, 420, in both which cases the principle above l down was acted upon by the court, and in each of wh the action was upon bond. And it would, indeed, be consistent with reason and principle, to hold, that the mere ceremony of putting a seal to an instrume that is, by the voluntary act of the parties themselves, contract which was void in itself on the ground of being violation of the law of the land, should be deemed val and an action maintainable thereon in a court of justi Nor do we see any force in the objection made in t course of the argument, that the plea does not sufficien allege that *the plaintiffs* were parties to the making of t lease for the purpose averred in the plea; for, the alleg tion "that the tenements and premises were demised the defendant for the express purpose," &c., necessar implies, and even in a more especial manner declares, th the express purpose was the purpose of the party who ma the demise, that is, of the plaintiffs.

Lightfoot v. *Tenant.*

Now, we cannot distinguish the case before us, up principle, from that of *Lightfoot* v. *Tenant*, 1 B. & P. 55 In that case the question arose upon a plea stating the st tute 7 Geo. 1, c. 21, by which it is enacted that all co tracts and agreements made by any of his majesty's su jects for the loan of any money by way of bottomry o any ship or ships in the service of foreigners, and boun or designed to trade to the East Indies; "and all contra and agreements whatsoever made by any of his majesty subjects or any person or persons in trust for them i the loading or supplying any such ship or ships with

cargo or lading of any sort of goods, merchandizes," &c., shall be void: and it was then alleged by the plea in that action, and found by the special verdict, that the plaintiff sold goods to the defendant in London, well knowing that the same were intended to be, and in order that they might be, carried by the defendant to Ostend, to be thence shipped on board ships destined to trade to the East Indies without license from the East India Company, and to be carried to Calcutta and there sold; and that the bond which was declared upon was given for the price of those goods. And this plea was held to be an answer to an action for the price of the goods. In that case it was argued, that, after the goods were once delivered to the buyer, he might change his mind, and use them in a different manner from that which was originally designed; as here, that the tenant might put the premises to a different use than that for which they were let: but it was answered that the entering into the contract with the illegal intent, tainted the contract with illegality, and prevented an action from lying thereon. And again, the case of *Langton* v. *Hughes*, 1 M. & S. 593, lays down the same rule of law. There, the sale of drugs to the defendants, which the plaintiffs knew were intended to be used in the defendant's brewery, in violation of the 42 Geo. 3, c. 38, s. 20, by which the brewer is prohibited from using anything but malt and hops in the brewing of beer, was held to be a contract on which the plaintiffs could not sue. In that case also it was argued that the statute neither prohibited the selling the articles nor buying them, but only the purpose for which they were used; and that the subsequent user was a matter over which the seller had no control. But it was observed by Bayley, J., in giving his judgment, "that the case of *Lightfoot* v. *Tenant* answers almost all the arguments urged for the plaintiffs." And the later authority of *Cannan* v. *Bryce*, 3 B. & A. 179, appears to us to go the full length of supporting the principle above laid down.

Langton v. *Hughes.*

Cannan v. *Bryce.*

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As to the defendant's right to retain the premises.

It was observed in the course of the argument for the plaintiffs, that, as they had granted a lease for twenty-one years, such term was vested in the defendant, and that he would be able to hold himself in for the remainder of it without payment of any rent. That point is not now before us; but, without giving any opinion how far the position is maintainable, it is obvious, that, if an ejectment should be brought upon the breach of any condition in the lease, the action of ejectment would at all events be free from the objection that the court was lending its aid to *enforce* a contract in violation of law. And, further, if an ejectment was brought by the lessors to recover possession, on the ground that the lease was void, it might be difficult for the lessee to maintain his right to hold under the lease, after having pleaded in the present action, in which he and the lessors were parties, that the indenture was void, and obtained the judgment of the court in his favour on that plea. Without, however, giving any opinion on that point, we think, for the reasons before given, that the defendant is entitled to judgment on this record.

Judgment for the defendant.

of the defendant were then under the care, government, and direction of the defendant, who was then driving the same in and along the said highway: nevertheless, the defendant so carelessly and improperly drove, governed, and directed the said cart and horse, that by and through the carelessness, negligence, and improper conduct of the defendant, the said cart of the defendant then ran and struck with great force and violence upon and against the horse of the plaintiff, and thereby the shaft of the said cart then pierced and entered into the horse of the plaintiff, by means whereof the said horse was then greatly hurt and wounded; and afterwards, to wit, on &c., died of the said hurt or wound, and became of no value to the plaintiff; and also, by means of the premises, the plaintiff was forced and obliged to pay, lay out, and expend, and did necessarily pay, lay out, and expend divers sums of money, to wit, 10*l.*, in and about the endeavouring to heal and cure the said horse of the said hurt or wound, &c.

The defendant pleaded not guilty.

The cause was tried before Bosanquet, J., at the sittings at Westminster in Trinity Term last. The plaintiff's witnesses having proved the running down of his horse by a horse of the defendant drawing a cart, and its death in consequence of the injury thereby inflicted, the defendant proposed to call witnesses to shew that the cart was not his, but that it belonged to one Jenkins, to whom he had lent the horse, and who at the time of the accident was driving.

It was objected, on the part of the plaintiff, that this evidence was not admissible under not guilty; the rule of Hilary Term, 4 Will. 4, providing, that, "in actions on the case, the plea of not guilty shall operate as *a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant*, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea; all other pleas in de-

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nial shall take issue on some particular matter of fact alleged in the declaration."

The evidence was rejected, the learned judge being of opinion that the fact of the cart and horse being under the care, government, and direction of the defendant, was admitted upon the record, and that the defendant, having trusted Jenkins with the horse, was responsible for the injury. A verdict was thereupon found for the plaintiff, with leave to the defendant to move to enter a nonsuit.

F. Robinson, in Trinity Term last, moved accordingly.—He submitted that the wrongful act of which the plaintiff complained was not simply a negligent driving, but *a negligent driving by the defendant;* and therefore it was competent to him under not guilty to give evidence to negative the wrongful act alleged to have been committed by him: and he referred to *Bennion* v. *Davison*, 3 M. & Welsby, 179, where the declaration stated that the defendants were *the owners* of a vessel lying in a certain river, and bound to Liverpool; that the plaintiff caused to be shipped on board her a quantity of potatoes, to be carried by the defendants, *as owners* of the said vessel, to Liverpool; and in consideration thereof, and of certain freight, the defendants promised the plaintiff to take proper care of and safely carry

quality of the act, that is, whether or not it was done in an unlawful manner. The rule in question is very carefully worded: it states what shall and what shall not be admitted—"In actions on the case, the plea of not guilty shall operate as a denial only of the breach of duty or wrongful act alleged to have been committed by the defendant, and not of the facts stated in the inducement; and no other defence than such denial shall be admissible under that plea." The first instance given is, that of nuisance—"In an action on the case for a nuisance to the occupation of a house by carrying on an offensive trade, the plea of not guilty will operate as a denial only that the defendant carried on the alleged trade in such a way as to be a nuisance to the occupation of the house, and will not operate as a denial of the plaintiff's occupation of the house." So, here, the plea only traverses the illegal or negligent driving, and not the fact of the horse having been driven by the defendant: these are two separate and distinct defences; and having by his plea confined himself to the one, the defendant cannot by evidence avail himself of the other. The next instance is that of the obstruction of a right of way, in which case not guilty puts in issue the obstruction only, and not the right. In trover, not guilty puts in issue the conversion only, and not the plaintiff's title to the goods—*Stancliffe* v. *Hardwick*, 2 C. M. & R. 1, 3 Dowl. 762. So, in *Frankum* v. *Lord Falmouth*, 2 Ad. & E. 452, 4 N. & M. 330, where the plaintiff declared that he was possessed of a mill, and by reason thereof was entitled to the use of a certain stream for the mill, and that the water ought to run and flow to the mill, and that the defendant wrongfully and injuriously diverted the same; it was held, that, on a plea of not guilty, the only matter in issue was the fact of the diversion, and that the right to the use of the stream as claimed was admitted. In *Dukes* v. *Gostling*, 1 Scott, 570, 1 New Cases, 589, the declaration (in case) stated that the plaintiff was possessed of a close and pond, that the defendant

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was possessed of a close *used and employed by him* (*private road,* adjoining the plaintiff's close and pond, that the defendant wrongfully cut and made *in his close used as a private road* a certain sewer, adjoining plaintiff's close and pond, and thereby diverted the w from the pond: and it was held that the allegation t the defendant's close was used by him as a private r was not put in issue by a plea of not guilty. In an ac for an escape, the act being primâ facie unlawful, guilty operates as a denial only of the neglect or def of the sheriff or his officers, but not of the debt, ju ment, or preliminary proceedings. So, in case again carrier, not guilty operates only as a denial of the los damage, but not of the receipt of the goods by the de dant as a carrier for hire, or of the purpose for wh they were received. In *Thomas* v. *Morgan,* 2 C. M. & 496, 5 Tyr. 1085, 4 Dowl. 223, in case for keeping fe cious dogs, well knowing them to be accustomed to l cattle, &c., and which bit and worried the plaintiff's cat the keeping the dogs, though ferocious, not being in it unlawful, the scienter was held to be put in issue by guilty. In an action for a malicious prosecution or fo libel, malice being the gist of the action, the want probable cause in the one case, and the fact of the co munication being privileged in the other, are put in is by not guilty—*Cotton* v. *Browne,* 3 Ad. & E. 312, 4 N M. 831; *Lillie* v. *Price,* 5 Ad. & E. 645, 1 N. & P. 16. B in *Wright* v. *Lainson,* 2 M. & Welsby, 739, 6 Dowl. 146, a *Lewis* v. *Alcock,* 3 M. & Welsby, 188, 6 Dowl. 389, on r guilty to a declaration against the sheriff for a false retu of nulla bona, it was held that it was not competent to t defendant to shew that the party whose goods he was co manded to take had become bankrupt or had assign them to another. In *Woolf* v. *Beard,* 8 C. & P. 373, whi was an action against the defendant for the neglige driving of his servant, it was held by Coleridge, J., th

the defendant, by pleading not guilty only, admitted that the driver was his servant. And in *Wheatley* v. *Patrick*, 2 M. & Welsby, 650, where A. borrowed of B. a horse and chaise, and went in it, accompanied by C., on an excursion of pleasure, C. driving, by whose mismanagement the horse and chaise were driven against and injured the plaintiff's horse: it was held (the only plea being not guilty) that an action on the case might be maintained for the injury against A., on a declaration charging that he was possessed of and driving the horse and chaise, and that by *his* negligent driving the injury was occasioned. Alderson, B., there said: "The only plea here is not guilty; the possession by the defendant is therefore admitted on the record, and the only question is whether there was negligent driving by the defendant, which I think is made out by the proof that he allowed Nicholls to drive, and that the injury was occasioned by his mismanagement. So, here, the defendant was guilty of the wrongful act of negligently driving by the hand of Jenkins. *Bennion* v. *Davison*, 3 M. & Welsby, 179, was an action of assumpsit; and non assumpsit puts in issue not the breach of the contract, but the contract itself. [*Coltman*, J.—The allegation of ownership there was wholly immaterial.]

Robinson, in support of his rule.—By the very terms of the rule, the plea of not guilty puts in issue that which is substantially the wrongful act or part of the wrongful act of which the plaintiff complains. Now, what is the wrongful act of which the plaintiff here complains? It is the negligent driving by the defendant: not the driving *or* the negligence; but a compound of both—negligently driving. Surely, then, it must be competent to the defendant, under not guilty, to shew that he was not driving at all. This is like the case of *Cotton* v. *Browne*, 3 Ad. & E. 312, 4 N. & M. 831, where Lord Denman says: "The injury complained of in this action is, not merely in the indicting,

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nor in the indictment being wrongful, but in *malici indicting*, and in doing so without reasonable or prol cause. The plea of not guilty is sufficient." *Thom Morgan* is also an authority for the defendant: Abinger there says: "The scienter is no inducemen is a part of the cause of action. If it was proved tha defendant's dogs did bite the plaintiff's cattle withou defendant's knowledge of their propensity, he would n liable to an action." "That which is alleged by way of veyance or inducement to the substance of the matter, not be so certainly alleged as that which is the substan self"—Co. Litt. 303. a. Words may be spoken or an in ment preferred, either wrongfully and maliciously, or u circumstances which render the act justifiable: in no can the act be said to be per se either innocent or wr ful. *Woolf* v. *Beard* is still sub judice. In case for a sance to the occupation of a house by carrying on a fensive trade, the plea of not guilty, it is true, ope as a denial only that the defendant carried on the all trade in such a way as to be a nuisance to the occup of the house, and not as a denial of the plaintiff's occ tion. But is the defendant precluded from shewing, u the plea of not guilty, that he did not carry on the tra all? *Dawson* v. *Moore*, 7 C. & P. 25, is an authority to contrary: Lord Abinger there ruled that the plaintiff r in such a case prove, not only the existence of the sance, but that the defendant committed it. In non the instances appended to the rule, or of the cases have been cited, does that which is said to be admi form part of the wrongful act which the defendan charged to have committed: the admission of mat stated in the inducement must be confined to those relate to the plaintiff. In *Wheatley* v. *Patrick*, the ques considered was, whether under the circumstances the d ing by the defendant's friend was in effect a driving the defendant himself: had the court been prepared

hold that the plea of not guilty admitted the fact alleged in the declaration, that the defendant was driving, it would have been a short answer to the application.

Cur. adv. vult.

TINDAL, C. J., now delivered the judgment of the court:—

The question before us arises on the proper construction to be put upon the rule of pleading laid down by all the courts in Hilary Term, 4 Will. 4, which applies to and governs the plea of not guilty in actions on the case. The declaration begins with a recital that whereas the plaintiff was lawfully possessed of a certain horse on which a servant of his was then riding along a certain public highway, "and whereas the said defendant was then possessed of a certain cart and of a certain horse drawing the same, and which said cart and horse of the said defendant were then under the care, government, and direction of the defendant, who was then driving the same in and along the said highway:" and, after such recital the declaration proceeds to allege that the defendant so carelessly and improperly drove, governed, and directed his said cart and horse, that, through the carelessness, &c., of the defendant, the cart of the defendant ran against the horse of the plaintiff, and injured it. And the question is, whether, under a plea of not guilty to this declaration, the defendant was at liberty to prove at the trial, that in fact the cart was not his, and that he was not driving it on the occasion above referred to, but that, at the time of the accident, it was lent to and driven by another person. And we are of opinion, that, as well upon the proper construction of that rule, as by the analogy furnished by the examples there given, and the authority of decided cases, such evidence was in this case inadmissible under the issue of not guilty.

The rule above referred to runs thus:—"In actions on

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the case, the plea of not guilty shall operate as a d only of the breach of duty or wrongful act alleged to been committed by the defendant, and *not of the stated in the inducement.*" Pausing for the moment the wrongful act, and the only wrongful act compl of, is, the careless and negligent driving of the defend the mere act of driving his own cart on the highway wrongful act whatever. But the rule further says shall not operate as a denial of the facts stated in inducement."

The inducement of the declaration is that part w precedes the charge, which contains a statement of facts out of which the charge arises, or which are n sary or useful to make the charge intelligible. An the present case, the two distinct statements, viz. " the plaintiff was lawfully possessed of his horse upon w his servant was riding on the highway," and, again, " the defendant was then possessed of a cart and horse d ing the same, and which were under the care, governm and direction of the defendant, and that he was then d ing the same along the highway," form together the ducement to the charge in this declaration. By the press words, therefore, of the rule, the plea shall operate as a denial of either of those statements. rule then proceeds further to state explicitly that ' other defence than the denial of the wrongful act shal admissible under the plea of not guilty. All other p in denial shall take issue on some particular matter of alleged in the declaration." The denial, therefore, of facts stated by way of inducement in the declarat under the plea of not guilty, is no less excluded by negative words of the former part of the rule, than by affirmative words of the latter part, which direct that s denial shall be made by a plea expressly traversing fact intended to be denied.

The examples which are given appear to us to ag

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with this construction of the rule; and the cases which have been decided lead to the same conclusion. It was contended in the argument that the admission of matters stated in the inducement must be confined to those matters which relate to the plaintiff; but the example of an action against a carrier, with which the rule concludes, shews decisively the contrary; it being there laid down that "the plea of not guilty will operate as a denial of the loss or damage, but not of the receipt of the goods by the *defendant*, or of the purpose for which they were received." The case of *Bennion* v. *Davison*, 3 M. & Welsby, 179, may be laid out of our consideration, as not applying to the present subject of discussion. That action was in assumpsit: and the rule of pleading which governs the plea of non assumpsit, is very different from the rule which governs the plea of not guilty in case; for, non assumpsit puts in issue every fact from which an implied contract may be inferred, and, in cases of express contract, it denies the express contract, and nothing else whatever. And, indeed, with respect to the case last referred to, it would be enough to say that it was decided on the ground that the fact of ownership of the vessel by the defendant, which was alleged in the declaration, was altogether an immaterial fact.

The cases of *Wright* v. *Lainson*, 2 M. & Welsby, 739, 6 Dowl. 146, and *Lewis* v. *Alcock*, 3 M. & Welsby, 188, 6 Dowl. 389, are very strong in favour of the construction which we put upon the rule in question. The first of these was an action against the sheriff for a false return of nulla bona to a writ of fi. fa. The declaration alleged the delivery to the sheriff of the writ, indorsed to levy &c., and the seizure in execution by the sheriff of the goods of the defendant; and complained that he had not the money in court, but falsely returned nulla bona. To this the sheriff pleaded not guilty: and the court held, that, although the false return was distinctly complained of, the sheriff

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was not entitled to set up as a defence the bankru the defendant before the execution of the writ. Th of *Lewis* v. *Alcock* was also an action for a false ret nulla bona, in which the declaration alleged that t fendant had goods within the bailiwick which the might have seized: and the court held, that, und plea of not guilty, the sheriff could not set up as a de that the defendant had assigned the goods to a party.

It has been contended that the statement of the d ant driving his own cart, by way of inducement, was cessary; and that it would have been sufficient to that he wrongfully and negligently drove his cart a the plaintiff's horse. But it is a sufficient answer that the plaintiff has in this case pursued the usual of pleading, in stating the fact in question by way ducement; and that, when the rule provides that m stated in the inducement shall not be put in issue b guilty, it must be taken to refer to such matters a usually stated in pleading by way of inducement. I be observed also, that a similar argument was made in the case of *Lewis* v. *Alcock*. It was there urged gument—suppose there were no such statement as " although there were divers goods and chattels of th H. G. &c., whereof the defendant ought to have levied" but that, after the statement of the writ, the decla had proceeded, " yet the defendant did not levy, alth there were divers goods" &c.; the latter clause would formed part of the duty complained of, and the mere t position of words can make no difference. Upon Mr. Baron Parke said: "It would then in truth be in ment put in the wrong place." Mr. Baron Alderson " The object of the rule is, that the parties when they to trial shall know as precisely as possible what the is. I am disposed to give the rule as large a constru as possible."

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Upon the grounds above stated, we think that the rule which has been obtained for a new trial should be discharged.

Rule discharged.

DOE *d.* EDWARD DAVIS *v.* GATACRE.

Saturday, June 8th.

THIS was an action of ejectment tried before Patteson, J., at the last Summer Assizes at Shrewsbury.

A common recovery suffered by a bare tenant for life, though unaccompanied by any feoffment or fine, operates a bar of the contingent remainders depending upon the particular estate, notwithstanding the statute 14 Eliz. c. 8.

The premises that were the subject of the action were comprised in a settlement made by one David Evans in April, 1721, whereby the estate was limited to David Evans for life, remainder to trustees to preserve contingent remainders, remainder to the use of Elizabeth the wife of David Evans for life; remainder to trustees for three hundred years upon certain trusts; remainder to the use of *John Phillips* for life [no limitation to trustees to preserve contingent remainders], and, after his death, if he should happen to marry, to the use of his first and other sons successively in tail male, remainder to his daughters; remainder to the use of William Phillips (brother of John Phillips) for life, remainder to his first and other sons in tail male, remainder to his daughters; remainder to the use of Elizabeth Phillips (sister of John Phillips) for life, remainder to her first and other sons in tail, remainder to her daughters; remainder to Elizabeth Phillips, widow, for life, remainder to her first and other sons in tail, remainder to her daughters: with an ultimate remainder to the right heirs of the settlor, in fee.

Recovery suffered.

John Phillips, the first tenant for life, being in possession, in Easter Term, 1758, suffered a common recovery with double voucher, declaring the uses of the recovery to himself in fee. In 1759 he married, and had a son, Joseph, who was born in 1760, and died without issue in 1824.

J. Phillips died.

John Phillips died in 1781.

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Death of second tenant.

William Phillips, the second tenant for life, died *October*, 1780, without issue.

Elizabeth Phillips, the third tenant for life, married Phineas Davis, and died in *February*, 1780, leaving a s Edward (the father of Edward Davis, the lessor of plaintiff), who died in 1784.

On the part of the defendant it was contended that recovery suffered by John Phillips, the first tenant for l in 1758, operated a forfeiture of the particular estate, consequently destroyed the contingent remainders pendent upon it; and that, even if this were not so, title of the lessor of the plaintiff accrued in 1780 (u the death of William Phillips), and was consequer barred by the statute of limitations (162).

On the other hand, it was contended that the recov did not operate in destruction of the contingent rem ders, and consequently that the right of the lessor of plaintiff did not accrue until the death of Joseph Phill the son of John Phillips, the first tenant for life, in 182

A verdict having been taken for the plaintiff, witl reservation of leave to the defendant to move to ente nonsuit—

Ludlow, Serjeant, in Michaelmas Term last, accordin obtained a rule nisi.

Hodgson (assisted by *Wilde* and *Talfourd*, Serjeants, *R. V. Richards*) shewed cause.—The question is whethe common recovery suffered by a bare tenant for life, accompanied by any feoffment or fine, is such an assura as, since the passing of the statute 14 Eliz. c. 8, is capa of barring a contingent remainder depending upon estate of the tenant for life. The existence of an estate

(162) The ejectment was brought by order of the Master of the Rolls, in a suit which was commenced before the passing of the sta 3 & 4 Will. 4, c. 27.

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freehold in the particular tenant is essential to the support of those estates that are contingent upon it: the tenant for life can only part with the freehold by certain modes; he may alienate it with the consent of those in remainder (formerly he might have conveyed it away by tortious feoffment); his estate may also be determined by merger, or by the lawful entry of the lord for condition broken or for forfeiture. Forfeiture may be effected in two ways—first, by tortious alienation, as, by conveyance by fine or feoffment to a stranger; the effect of which is, to create a new fee, and so destroy the old one, and displace the limitations dependent upon it—secondly, by acknowledgment of an adverse title, as, by accepting a fine from a stranger; by this no new estate is created, the life estate still continues until entry by the lord (163).

Common recoveries owed their introduction to the statute De Donis, 13 Edward 1, c. 1—per Vaughan, C. J., in *Dixon* v. *Harrison*, Vaughan, 51; for which the authority cited is *Pelham's* Case, 1 Rep. 14. Between the statute of uses, 27 Hen. 8, c. 10, and the 32 Hen. 8, c. 31, a recovery was considered a tortious assurance, and the object of this last mentioned statute was to remove this tortious effect, by enacting that a recovery against the particular tenants of any lands should be void against such persons to whom the reversion or remainder should then appertain. The 14 Eliz. c. 8 was passed for the purpose of extending the former statute, and preventing a common recovery from working a forfeiture: and we are warranted in concluding from *Pelham's* Case, that, after the statute 14 Eliz. c. 8, a recovery by tenant for life was a perfectly harmless assurance: and on no occasion since has the application of that statute to the subject been considered; though it must be conceded to be the generally received opinion of the profession that the suffering a recovery by

(163) See Co. Litt. 251. a., b., 252. a.

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tenant for life bars the life estate. The preamble of statute contains an enumeration of the different spe of particular tenants:—"Where divers persons be seised, or that have been seised, of lands, tenements, hereditaments, as tenants by the curtesy of England, nants in tail after possibility of issue extinct, or other only for term of life or lives, or of estates determin upon life or lives, have heretofore permitted and suffe other persons by agreement or covin between them t to recover the same lands and tenements and other h ditaments against the same particular tenants in queen's majesty's court, or have permitted and suffe themselves to be vouched by other persons, by agreem or covin between them had, in recoveries suffered of same lands, tenements, and other hereditaments, in queen's majesty's court, to the great prejudice of thos whom the reversion or remainder thereof hath appertai or ought to appertain." For remedy whereof, the section enacts "that all such recoveries hereafter to be or prosecuted by agreement of the parties, or by covin is aforesaid, against any such particular tenant of lands, tenements, or hereditaments, whereof the same ticular tenant is, or hereafter shall be seised of any s particular estate as is aforesaid, or against any other voucher over of any such particular tenant, or of having or that had right or title to any such partic estate or tenancy as is aforesaid, shall from henceforth against such person or persons to whom any reversio remainder thereof by force of any conveyance or de before that time had or made, shall, ought or may ap tain, and against their heirs and successors, be clearly utterly void and of none effect, any law or usage her fore had to the contrary thereof in anywise notwithst ing:" not null and void to all intents and purposes; as against "such person or persons to whom any rever or remainder thereof by force of any conveyance or de

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before that time had or made, shall, ought, or may appertain, and against their heirs and successors"—words which in their natural sense would be taken to point to contingent as well as to vested remainders. It is, however, unnecessary to contend for that; for, if the statute operated to make the recovery void as against the vested remainder or the reversion, it could only convey an interest for the life of the particular tenant. A forfeiture might have been incurred had the conveyance been by fine or feoffment: fines were proclaimed in open court; a feoffment was accompanied by livery of seisin; but common recoveries passed without any mark of publicity. *Goodright* d. *Fowler* v. *Forester*, 1 Taunt. 578. The history of the law upon this subject since the statute is well illustrated by *Jennings's* Case, 10 Rep. 44, *Wiseman* v. *Crow*, Cro. Eliz. 562, *Wiseman* v. *Jennings*, Cro. Eliz. 570, *Peck* v. *Channell*, Cro. Eliz. 827, *Leach* v. *Cole*, Cro. Eliz. 670, and *Strange* v. *Temple*, 1 Sid. 90. It is undoubtedly the generally received opinion of the profession that a recovery suffered by tenant for life does, notwithstanding the 14 Eliz. c. 8, bar contingent remainders: but this opinion seems to owe its rise to the fact that the statute has not been sufficiently adverted to in any of the cases. *Smith* d. *Richards* v. *Clyfford*, 1 T. R. 738, where the statute was adverted to, is identical with *Pelham's* Case, save that there there was interposed an estate tail. The only other case in which the statute has been explicitly adverted to, and the point now urged suggested, is that of *Boughton* v. *Sandilands*, 3 Taunt. 342, where Serjeant Williams, arguing the case on the part of the defendant, says (p. 373): "By the statute 14 Eliz. c. 8., all recoveries had against any particular tenant, or against any other, with voucher over of such particular tenant, shall, as against all persons in remainder or reversion, be utterly void and of none effect. And therefore, though this recovery might be good against Sir George Boughton, it was not good against them in the contingent

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remainders, and so, clearly void against the daughte
And so the court held, but upon other grounds. In
other instance has the point ever been hinted at: and
authority of any importance occurs until thecase of *Pha*
v. *Holmes*, 1 Lev. 11. There one seised in fee devis
the land to his eldest son, Thomas, for life, and, if he di
without issue living at his death, to Leonard, another s
and his heirs, but, if Thomas had issue living at his deat
then the fee should remain to the right heirs of Thom
for ever. Thomas entered after the devisor's death, a
suffered a common recovery (under which the defenda
claimed), and died without issue; whereupon Leonard e
tered and made a lease to the plaintiff. The princi
question was whether or not the estate of Leonard w
barred by the recovery: and the court held, that, the
tate of Thomas being only for life, by this devise the
mainder to Leonard was a contingent remainder, a
barred by the recovery. That case furnishes no authori
against the present argument; for, the recovery the
operated a merger of the particular estate, and therefo
destroyed the contingent remainder; and the statute
Eliz. c. 8, was not adverted to. In *Loddington* v. *Kym*
1 Salk. 224, 3 Lev. 431, 1 Lord Raym. 203, Sir Michs
Armin, being seised in fee, devised a rent-charge, a
then devised the land to A. for life, without impeachme
of waste; and "in case he have any issue male, then
such issue male and his heirs for ever; and if he die wit
out issue male, then to B. and his heirs for ever." A. e
tered and suffered a common recovery, and died witho
issue: and the court held that the recovery suffered by
had barred the estate limited to his issue, that being co
tingent, and likewise the remainder limited to B. and h
heirs, because that was contingent, not vested, and nc
never could vest; and that A. had gained a tortious fe
which would be good against B. and his heirs, and lik
wise against all persons but the right heirs of the devis

In *Carter* v. *Barnardiston*, 1 P. Wms. 509, one seised of the manors of A. and B. devised then to C. for life, and, if C. should have issue male, then to such issue male and his heirs for ever, and, if C. should leave no issue male, then the manor of A. to J. S., in fee, and the manor of B. to J. N. in fee. C. suffered a common recovery of these manors; and the recovery was held to bar the contingent estates limited to J. S. and J. N. In a further report of the same case, *Barnardiston* v. *Carter*, 3 Bro. Parl. Cas. 64, the judges being asked "whether the remainder to J. S. was of that nature as to be barred by the recovery," after conferring together, returned for answer, "that the same was only a contingent remainder." [*Tindal*, C. J.—Meaning, that, being a contingent remainder, it was barred.] That is a very imperfect authority for holding a recovery to be a bar to a contingent remainder since the 14 Eliz. c. 8, which throughout the several arguments was not once adverted to. The same remark applies to the cases of *Doe* d. *Browne* v. *Holme*, 3 Wils. 237, 2 W. Blac. 777, *Goodright* d. *Docking* v. *Dunham*, Doug. 264, *Goodtitle* d. *Winckles* v. *Billington*, Doug. 753, and *Doe* d. *Gilman* v. *Elvey*, 4 East, 313. In *Doe* d. *Herbert* v. *Selby*, 4 D. & R. 608, 2 B. & C. 926, the court considered that the contingent remainder was defeated by the destruction of the particular estate by a recovery. But *Roe* d. *Clemett* v. *Briggs*, 16 East, 406, shews that it is the alteration of the preceding estate that affects the contingent remainder. It cannot be denied that there are traces in the books of a prevalent opinion that a recovery operates a bar of the contingent remainder by reason of its working a forfeiture of the particular estate; and that all the text-writers (down to Preston's Conveyancing, p. 111, where a doubt is suggested) have adopted *Loddington* v. *Kyme*; but none of them advert to the fact that the statute 14 Eliz. c. 8, was not there cited, nor have any of them considered the effect of that statute. Had the doctrine been expressly laid down

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in any case where the statute was distinctly adverted the point would undoubtedly not have been open to ar ment: but it is submitted that, under the circumstan above alluded to, the cases cannot be considered to h settled the question.

In Fearne's Contingent Remainders, 323, it is said "There are some acts by tenant for life, which, thou they amount to a forfeiture of his estate, so as to giv vested remainder-man title to enter if he pleaseth, yet, they discontinue, devest, or disturb no remainder or s sequent estate, nor make any alteration in or merger of particular estate, do not therefore, as it seems, destroy affect a contingent remainder, unless advantage is taken the forfeiture by any subsequent vested remainder-m Thus, if tenant for life accepts a fine come ceo &c. fro stranger, it is undoubtedly a forfeiture, so as to entitl remainder-man to enter, for he hereby affirms on rec the reversion to be in a stranger; and yet it does not place or devest the remainder or reversion (Co. Litt. 252 Rep. 106.b.). Therefore, where A. was tenant for life, mainder to his first son in tail &c., remainder to B. for l remainder to his first son in tail &c., A., having a son, cepted a fine from B., and then made a feoffment in f then B. had issue a son; and it was resolved that the ceptance of the fine displaced nothing; and though A feoffment displaced all the estates, yet the right of enty the son of A. supported the contingent remainders" *Lloyd* v. *Brooking*, 1 Ventr. 188. This may probably rec cile many of the foregoing cases with the statute. If, the fore, the recovery suffered by John Phillips, the tenant life, could have any operation at all as a forfeiture, it only in the sense of its being an acknowledgment up record of title in a stranger, and advantage could only taken of it by entry.

Ludlow, Serjeant, *Whateley*, and *Gray*, contrà.—T

authorities are clear and uniform, that, as well before as since the statute 14 Eliz. c. 8, a recovery suffered by a tenant for life, not only operates a forfeiture of the particular estate, but destroys the contingent estates depending upon it. This has been undoubted law for more than two centuries, and never has been seriously questioned until now—*Herring* v. *Brown*, Skinner, 74; *Loddington* v. *Kyme*, 1 Salk. 224, 3 Lev. 431, 1 Lord Raym. 203; *Clerke* v. *Pywell*, 1 Wms. Saund. 319; *Careswell* v. *Vaughan*, 2 Wms. Saund. 42, in notis; *Purefoy* v. *Rogers*, 2 Wms. Saund. 380; *Denn* d. *Webb* v. *Puckey*, 5 T. R. 299; *Doe* d. *Phipps* v. *Lord Mulgrave*, 5 T. R. 320; *Doe* d. *Davy* v. *Burnsall*, 6 T. R. 31; *Doe* d. *Gilman* v. *Elvey*, 4 East, 313; *Doe* d. *Herbert* v. *Selby*, 2 B. & C. 926, 4 D. & R. 608; Sheppard's Epitome, c. 135, p. 830; Sheppard's Touchstone, 40—48; Cruise's Digest, Vol. 1, p. 94, Vol. 2, p. 474; Piggott on Recoveries, 84, 92, 94; Comyns's Digest, Recovery (B. 2), pl. 1; Bacon's Abridgment, *Reversions and Remainders* (G); Preston, 111; 2 Bl. Com. 274, 361; Fearne's Contingent Remainders, 281. And no authority is cited to bear out the suggestion that this doctrine owes its rise to a disregard of the statute 14 Eliz. c. 8. Nor is it correct to say that the effect of the statute has never been adverted to: for, it is mentioned in Wood's Institutes, 264, 361, in 1 Inst. 356. a., in *Wiseman* v. *Crow*, Cro. Eliz. 562, and in *Smith* d. *Richards* v. *Clyfford*, 1 T. R. 738.

TINDAL, C. J.—The question that has been argued before us—and argued very learnedly—is, whether the common recovery suffered by John Phillips in 1758 (he being a bare tenant for life) did or did not operate a bar of the contingent remainders depending upon such his estate for life. It appears that, by a settlement of 1721, the estate in question was limited to John Phillips for life, with remainder to the use of his first and other sons in tail male. It is immaterial to consider the subsequent vested re-

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mainders; the only point that has been argued l whether or not the remainders contingent upon th estate of John Phillips were destroyed by the comm covery.

It was admitted by the learned counsel who argu case on the part of the lessor of the plaintiff, that text-writers, and all the cases upon this subject from *Ham's* Case, 1 Rep. 14, downwards, concur in holding, if a tenant for life suffer a common recovery, the c gent remainders that are dependent upon his estat thereby barred; upon this ground—that the tena life has, either by his alienation of a greater estate he was entitled to committed a forfeiture, or that h by allowing himself to be vouched over to warranty coming in and assenting to it, warranted a greater than he was entitled to, and thus violated the faith which the estate was granted to him, and incurred feiture. And the immediate consequence therefore fo that the contingent remainders were not vested durin continuance of the particular estate of the tenant fo and therefore fall to the ground, and can never be re But it is said that in none of those authorities wa effect of the statute of 14 Eliz. c. 8, sufficiently adverte for that that statute declaring that a common recove tenant for life &c. "shall from thenceforth, as against person or persons to whom any reversion or rema thereof by force of any conveyance or devise before time had or made, shall, ought, or lawfully may a tain, and against their heirs and successors, be *cl and utterly void and of none effect;*" the consequen that no forfeiture is thereby incurred, but the subseq estates remain as they were before. In the first place can hardly conceive it to be possible that the effect of statute should have been overlooked by the courts the various occasions on which the point came to be cussed before them. Of the cases cited on the part o

lessor of the plaintiff, I will only notice two—*Plunket* v. *Holmes*, 1 Levinz, 11 (cited in the argument from Gilbert on Uses, 302), and *Carter* v. *Barnadiston*, 1 P. Wms. 505. In *Plunket* v. *Holmes*, one seised in fee devised the land to his eldest son, Thomas, for life, and, if he died without issue living at the time of his death, to Leonard, another son, and his heirs, but, if Thomas had issue living at his death, that then the fee should remain to the right heirs of Thomas for ever. Thomas entered after the devisor's death, and suffered a common recovery (under which the defendant claimed), and died without issue; whereupon Leonard entered and made a lease to the plaintiff. The principal question was whether or not the estate of Leonard was barred by the recovery: and the court held that "the estate of Thomas being only for life, by this devise the remainder to Leonard was a contingent remainder, and barred by the recovery." Then we come to the case of *Carter* v. *Barnadiston*. There, one seised of the manors of A. and B. devised those manors to Evers Armin for life, and, in case he should have issue male, then to such issue male and his heirs for ever, and, after the death of Evers Armin, in case he should leave no issue male, he devised A. to Thomas Styles and B. to Sir T. Barnadiston, in fee: and the question propounded to the judges by the House of Lords was whether the remainders to Styles and Sir T. Barnadiston were of such a nature as to be barred by the recovery—pointedly calling their attention to the distinction between a contingent and a vested remainder. The answer of the judges was that "the same was only a contingent remainder:" in effect declaring, that, being only a contingent remainder, it was destroyed by the recovery. Why should we, after an undeviating stream of concurring authorities from so early a period even down to the late case of *Doe* d. *Herbert* v. *Selby*, 2 B. & C. 926, 4 D. & R. 608, assume that all our predecessors have overlooked

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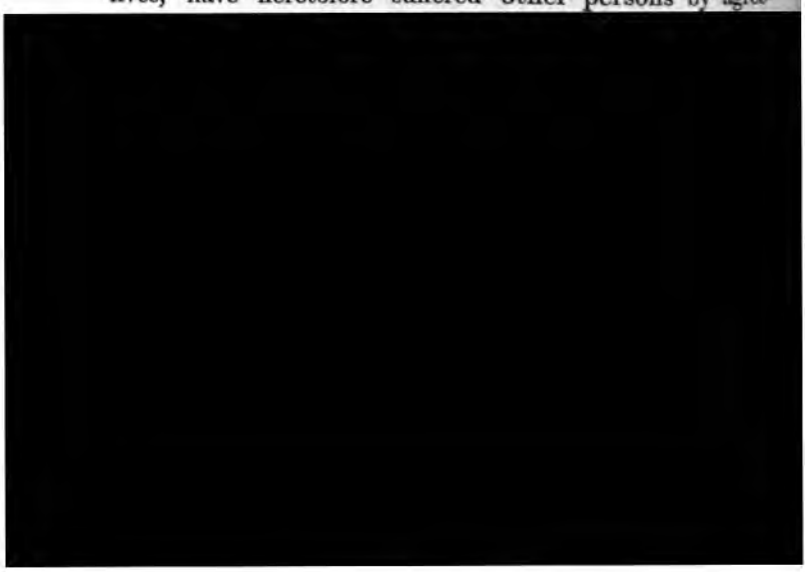
the statute of Elizabeth, to which their attention must almost inevitably have been drawn?

Let us, however, look at the statute, and judge for ourselves whether it can have the effect contended for on the part of the lessor of the plaintiff, viz. that of preserving the contingent remainders. The 14 Eliz. c. 8 was passed for the express purpose of making more efficient the 32 Hen. 8, c. 31. By the last-mentioned statute, recoveries of land had by assent of the parties against tenant for term of life were held to be void, unless by good title, or assent of him in reversion or remainder. The 32 Hen. 8, c. 31, provided only for the case of a writ of entry against tenant for life, the tenant vouching over the common vouchee, and not for the case of tenant for life coming in by voucher. The 14 Eliz. c. 8 includes every possible case in which a tenant for life can suffer a common recovery, either by being the original party to it, or by coming in upon a voucher by the tenant to the præcipe. It recites "that divers persons, being seised, or that have been seised, of lands, tenements, and hereditaments, as tenants by the curtesy of England, tenants in tail after possibility of issue extinct, or otherwise only for term of life or lives, or of estates determinable upon life or lives, have heretofore suffered other persons by agree-



after the determination of the tenancy for life; and the statute goes on to declare that all common recoveries so suffered shall be altogether void—"that all such recoveries hereafter to be had or prosecuted by agreement of the parties, or by covin, as is aforesaid, against any such particular tenant of any lands, tenements, or hereditaments whereof the same particular tenant is or hereafter shall be seised of any such particular estate as is aforesaid, or against any other with voucher over of any such particular tenant, or of any having or that had right or title to any such particular estate or tenancy as is aforesaid, shall from henceforth, as against such person or persons to whom any reversion or remainder thereof by force of any conveyance or devise before that time had or made, shall, ought, or lawfully may appertain, and against their heirs and successors, be clearly and utterly void and of none effect, any law or usage heretofore had to the contrary thereof in anywise notwithstanding." The statute evidently points at persons in reversion or remainder who were deprived by the recovery of their power of entry, and not of contingent remainders, whose vesting was altogether uncertain.

It appears to me, that the statute has not the effect that has been contended for on the part of the lessor of the plaintiff; that, with respect to contingent remainders, the operation of the common recovery remains precisely as it was before the statute passed, viz. a forfeiture of the particular estate, and a destruction of the contingent remainders depending upon it; and consequently that Joseph, the son of John Phillips, who was born after the common recovery was suffered, never had any right.

VAUGHAN, J.—I am of the same opinion. The argument so ingeniously urged by Mr. Hodgson rests upon an assumption that the statute of 14 Eliz. c. 8, has slumbered in the statute book from the time of its passing to this time. It is impossible, however, to look at the numerous

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cases and opinions of text-writers upon the subject w being satisfied that the statute must have been present minds of those learned judges by whom those cases we cided. In one case at least—*Smith* d. *Richards* v. *Cl* 1 T. R. 738—the statute is particularly adverted to. hurst, J., there says: "The only question that has been is, whether the recovery that has been suffered by Cl the tenant for years, and Richards, the tenant for li the acts which were done preparatory to it, will amou a forfeiture of their respective estates. Now, as to ford the tenant for years; it will be totally nugat consider whether he has done any act to forfeit his e unless the tenant for life has also forfeited his: for, has not, he is the only person who can take advanta the forfeiture of the estate for years; so that I shall l question relative to the tenant for years entirely out case. In regard to Richards, the tenant for life, insisted, that, by suffering a recovery, he has forfeite estate for life; for which was cited Co. Litt. 356. a. passage is: 'Here note, that, although the action be and feigned, yet is the recovery so much respected i as it worketh a discontinuance. But, if tenant fo suffer a common recovery, or any other recovery, by and consent between the tenant for life and the reco this is a forfeiture of his estate, and he in the reve may presently enter for the forfeiture.' Lord Coke observes, that, 'since Littleton wrote, the statute Eliz. c. 8, was made concerning this matter, which been well construed and expounded, and needs not repeated.' But we all of us think that this passag only be understood of a *bare tenant for life*, who upon himself to do an act inconsistent with the natu his estate; and which before the statute of Eliz would have displaced the remainders subsequent, turned them to a right. The forfeiture of his estate therefore a proper punishment upon him for attem

to do an act inconsistent with his tenure; and calculated to injure him in the reversion." We should be declaring those learned persons to have been in a state of more than Egyptian darkness, if we were to adopt the conclusion to which we have been invited.

COLTMAN, J.—The argument that has been urged on the part of the lessor of the plaintiff is founded on the assumption that the object of the statute 14 Eliz. c. 8 was, to turn that which by ordinary intendment is tortious into an innocent conveyance. But I do not perceive that there is any fair foundation for it. It is obvious that *Pelham's* Case was not the occasion of the passing of the statute 14 Eliz. c. 8; but the case there cited from Bendloe: its object was, to remedy a defect in the prior statute of 32 Hen. 8, c. 31; but it did not in any other respect alter the effect of a common recovery: and it is admitted, that, before that statute (the 14 Eliz. c. 8), a recovery suffered by tenant for life, though of no avail against a vested remainder, was still a forfeiture of the life estate, and so operated to destroy contingent remainders. We are now, after a lapse of nearly three centuries, called upon to adopt a new reading of the statute of Elizabeth, upon a suggestion that all the judges before whom this point has ever been considered have entirely overlooked that statute. I for one am not prepared to adopt that suggestion. Even if the cases were in direct conflict with the words of the statute, it would be arrogating too much to overturn so strong and uniform a current of authorities, But it appears to me that the statute and the cases are not at variance; and therefore that the present rule, for entering a nonsuit, must be made absolute.

ERSKINE, J.—I am of the same opinion: and I feel it to be unnecessary to say more than that the very circumstance of Lord Coke in *Pelham's* Case observing that the

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recovery there was suffered before the passing of th tute 14 Eliz. c. 8, would of necessity point the att of succeeding judges to that statute.

Rule absol

WILLIAMS and Others *v.* ASPINALL, one of the Officers of THE CENTRAL LIVERPOOL JOINT-BANK.

Monday, June 11th.

The court made a rule absolute for filing the account (and certificate and affidavit verifying the same) filed at the stamp-office pursuant to the 7 Geo. 4, c. 46, s. 6, and for entering a suggestion on the roll of the persons who appeared from the affidavit to be members of the copartnership therein mentioned. *Sed quære.*

BY the 7 Geo. 4, c. 46, an act to enable copartners more than six in number to carry on business as b in England, s. 4, it is enacted, "that, before any suc poration or copartnership exceeding the number of si sons in England, shall begin to issue any bills or no borrow, owe, or take up any money on their bills or an *account or return* shall be made out, according form contained in the schedule marked A to the a nexed, wherein shall be set forth the true names, ti firm of such intended or existing corporation or copa ship, and also the names and places of abode of a members of such corporation or of all the partner cerned or engaged in such copartnership, as the respectively shall appear on the books of such corpo or copartnership, and the name or firm of every ba banks established or to be established by such corpo or copartnership, and also the names and places of of two or more persons, being members of such co tion or copartnership, and being resident in En who shall have been appointed public officers of suc poration or copartnership, together with the title of or other description of every such public officer r tively, in the name of any one of whom such corpo shall sue and be sued as hereinafter provided, and al name of every town and place where any of the bi

notes of such corporation or copartnership shall be issued by any such corporation or by their agent or agents; and every such amount [account] or return shall be delivered to the commissioners of stamps, at the stamp-office in London, who shall cause the same to be filed and kept in the said stamp-office, and an entry and registry thereof to be made in a book or books to be there kept for that purpose by some person or persons to be appointed by the said commissioners in that behalf, and which book or books any person or persons shall from time to time have liberty to search and inspect on payment of 1*s.* for every search."

Section 6 enacts "that a copy of any such account or return so filed or kept and registered at the stamp-office as by the act is directed, and which copy shall be certified to be a true copy under the hand or hands of one or more of the commissioners of stamps for the time being, upon proof made that such certificate has been signed by the hand-writing of the person or persons making the same, and whom it shall not be necessary to prove to be a commissioner or commissioners, shall in all proceedings, civil or criminal, and in all cases whatsoever, be received in evidence as proof of the appointment and authority of the public officers named in such account or return, and also of the fact that all persons named therein as members of such corporation or copartnership were members thereof at the date of such account or return."

Section 11 enacts "that all and every decree or decrees, order or orders, made or pronounced in any suit or proceeding in any court of equity against any public officer of any such copartnership carrying on business under the provisions of this act, shall have the like effect and operation upon and against the property and funds of such copartnership, and upon and against the persons and property of every or any member or members thereof, as if every or any such

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members of such copartnership were parties members b the court to and in any such suit or proceeding; and it shall and may be lawful for any court in which suc der or decree shall have been made, to cause such orde decree to be enforced against every or any memb such copartnership, in like manner as if every memb such copartnership were parties before such court to in such suit or proceeding, and although all such mem are not before the court."

Section 12 enacts "that all and every judgment judgments, decree or decrees, which shall at any time the passing of this act be had or recovered or entere as aforesaid in any action, suit, or proceedings in l equity against any public officer of any such copartner shall have the like effect and operation upon and ag the property of such copartnership, and upon and ag the property of every such member thereof as aforesai if such judgment or judgments had been recovered o tained against such copartnership; and that the b ruptcy, insolvency, or stopping payment of any such p officer for the time being of such copartnership, in hi dividual character or capacity, shall not be nor be strued to be the bankruptcy, insolvency, or stopping ment of such copartnership; and that such copartne and every member thereof, and the capital stock and e of such copartnership, and the effects of every memb such copartnership, shall in all cases, notwithstandin bankruptcy, insolvency, or stopping payment of any public officer, be attached and attachable, and be i respects liable to the lawful claims and demands o creditor and creditors of such copartnership, or of member or members thereof, as if no such bankruptc solvency, or stopping payment of such public offic such copartnership had happened or taken place."

Section 13 enacts "that execution upon any judg

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in any action obtained against any public officer for the time being of any such corporation or copartnership carrying on the business of banking under the provisions of this act, whether as plaintiff or defendant, may be issued against any member or members for the time being of such corporation or copartnership; and that, in case any such execution against any member or members for the time being of any such corporation or copartnership shall be ineffectual for obtaining payment and satisfaction of the amount of such judgment, it shall be lawful for the party or parties so having obtained judgment against such public officer for the time being to issue execution against any person or persons who was or were a member or members of such corporation or copartnership at the time when the contract or contracts, or engagement or engagements in which such judgment may have been obtained was or were entered into, or became a member at any time before such contracts or engagements, were executed, or was a member at the time of the judgment obtained: provided always that *no such execution as last aforesaid shall be issued without leave first granted, on motion in open court, by the court in which such judgment shall have been obtained,* and which motion shall be made on notice to the person or persons sought to be charged, nor after the expiration of three years next after any such person or persons shall have ceased to be a member or members of such corporation or copartnership."

Judgment having been obtained against the company in an action against them as indorsers of a bill of exchange—

Wilde, Serjeant, upon an affidavit of the facts, and that, in April last, the account or return required by the 6th section had been duly filed at the stamp-office in London,

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and production of a copy of such account certified by of the commissioners of stamps and taxes, moved tha plaintiff be at liberty to file the account and certificat affidavit in this court in this cause, *and to enter a su tion on the roll of the persons who appeared from the davit to be members of the copartnership therein tioned.* He referred to *Bartlett* v. *Pentland*, 1 B. & 704, where it was held, that, wherever, by the provisi an act of parliament, a person not a party to the record be affected by a judgment, or where the judgment is such as would not be ordinarily warranted by the pre proceedings on the record, the proper course is to en suggestion on the roll, so that the party to be aff may demur if the plaintiff do not set forth facts to brin case within the act of parliament, or that he may tra those facts if untrue. The motion there was made u the 5 Geo. 4, c. clx, the 1st section of which provide all actions brought against the company (the St. Pat Assurance Company of Ireland) are to be prose against the secretary for the time being or against member of the company as the nominal defendant for and on their behalf; by s. 4, execution upon any judg in such action may be issued against any member or m bers for the time being of the company; by s. 8, in such execution against the members for the time l shall be ineffectual, the party so having obtained ment may issue execution against any person who w member at the time the contract was entered into which such action may have been brought, but no execution to be issued without leave of the court: a was held that a party who had brought an action obtained judgment against the secretary, could not fully issue execution against another member of the pany without having previously, by leave of the court, *gested on the record* facts to shew that the party ag

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whom he so issued execution was liable as a member of the company.

THE COURT, without making any remark, granted a—

Rule absolute (164).

(164) The courts of Queen's Bench and Exchequer have since (in Hilary Term, 3 Vict.) decided that the proper course in such case is to proceed by scire facias: the matter is still sub judice in the Common Pleas, in a case of Whittenbury v. Law, which will be found post, Vol. 8. The decision of the King's Bench, in Bartlett v. Pentland, is somewhat qualified by the cases last alluded to.

HIGHAM *v.* RABETT.

Monday, June 10th.

In trespass for breaking and entering the plaintiff's close, and prostrating his gates and gate-posts, the defendant pleaded (amongst other pleas) a right of way on foot and with horses, cattle, carts, waggons, and other carriages, for himself and his servants, at all times of the year, at his and their free will and pleasure, for the more convenient occupation of the defendant's close called King's Haugh Wood. At the trial, the jury found that the defendant had a limited right only for the purpose of conveying timber from the wood to the highway:—Held, that the rules of Hilary Term, 4 Will. 4, V. ss. 4, 5, 6, did not authorize the court to enter the verdict distributivè for the defendant on this plea.

THIS was an action of trespass for breaking and entering the plaintiff's close, and prostrating his gate and gate-posts.

Pleas—first, not guilty—secondly, a right of way on foot, and with horses, cattle, carts, waggons, and other carriages, for the defendant and his servants, at all times of the year, at their free will and pleasure, for the more convenient occupation of a close of the defendant's called King's Haugh Wood—thirdly, a similar right in respect of a close called Further Barker's—fourthly, liberum tenementum.

The several issues raised on these pleas came on for trial before Littledale, J., at the last Summer Assizes at Bury St. Edmunds. It appeared that the plaintiff was possessed of a close (the locus in quo) lying between King's Haugh Wood (the defendant's close) and the highway, and that the defendant, in the assertion of a supposed right of way over the plaintiff's close, removed a gate and cut down a post: it also appeared that the way in question had for a number of years been used by the owners of King's Haugh Wood, once in seven or eight years, for the purpose of

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conveying thence timber and wood felled there; and was much conflicting testimony as to whether or not was done with the permission of the owner of the plain close for the time being. There was, however, no evi to shew that the way had ever been used for any other the specific purpose above mentioned; nor was it p that the alleged trespass was committed in asserti this limited right only.

On the part of the plaintiff it was contended tha plea was not sustained by the evidence.

The jury found for the plaintiff on the first, third fourth issues, and, as to the second, that the defe had a right of way over the close in question, but on the purpose of carting timber and wood from King's H Wood.

Under the direction of the learned judge, therefo verdict was entered for the defendant upon the s issue.

F. Kelly, in Michaelmas Term last, pursuant to reserved, obtained a rule nisi to enter the verdict that issue for the plaintiff.—He cited *Drewell* v. *T* 3 B. & Ad. 735.

Stephen, Serjeant, *Biggs Andrews*, and *Palmer*, former day in this term, shewed cause.—Upon this r the only question raised was, whether or not the defe had such a right of way as would justify the tre charged: and the finding of the jury is in effect a fi for the defendant upon the whole substance and impo meaning of the issue. The defendant was not bou prove a right more than sufficient to cover the tre charged in the declaration. By not new assignin plaintiff admits that the gate was an obstruction. [*Vau* J.—Would not this verdict be evidence of a larger in the defendant than he proved? The difficulty w

have been obviated had he pleaded the limited right.] If the declaration, instead of its present general form, had charged specially the entering on foot, with horses, and with carts, &c., and the defendant had succeeded in establishing one description of right only; in that case the defendant would have been bound to apply to have the verdict entered distributively under the rules of Hilary Term, 4 Will. 4, ss. 4, 5, 6 (165)—*Knight* v. *Woore*, 3 New Cases, 3, 3 Scott, 326; *Phythian* v. *White*, 1 M. & Welsby, 216, Tyr. & G. 515, 4 Dowl. 714. But the defendant here is not driven to that; he has proved enough to cover the trespass with which the declaration charges him. [*Tindal*, C. J.—The difficulty is, that, if the verdict be entered generally for the defendant, his right is thereby established to a greater extent than is warranted by the evidence.] That does not necessarily follow upon a record framed like this. In *Bennington* v. *Bennington*, Cro. Eliz. 157, in trespass for entering the plaintiff's house and land, the defendant pleaded that it was the freehold of Joan Bennington,

(165) Trespass, V., 4—"Where, in an action of trespass quare clausum fregit, the defendant pleads a right of way with carriages and cattle and on foot in the same plea, and issue is taken thereon, the plea shall be taken distributively; and, if a right of way with cattle or on foot only shall be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of way so found, and for the plaintiff in respect of such of the trespasses as shall not be so justified."

5. "And where, in an action of trespass quare clausum fregit, the defendant pleads a right of common of pasture for divers kinds of cattle, ex. gr., horses, sheep, oxen, and cows, and issue is taken thereon, if a right of common for some particular kind of commonable cattle only be found by the jury, a verdict shall pass for the defendant in respect of such of the trespasses proved as shall be justified by the right of common so found, and for the plaintiff in respect of the trespasses which shall not be so justified."

6. "And in all actions in which such right of way or common as aforesaid, *or other similar right*, is so pleaded that the allegations as to the extent of the right are capable of being construed distributively, they shall be taken distributively."

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and he entered as her servant and by her commandment; and the issue was, if it were her freehold or not. The jury found it was the freehold of the plaintiff for two parts, and the frank-tenement of the said Joan for the third part: and the question was, if the plaintiff should have judgment upon this verdict. And the court held clearly he could not; for, although the issue is found against the defendant, viz. that all was not the freehold of J. B., yet, it appearing a tenancy in common, so that the plaintiff could not maintain the action, judgment should be given against him. To the same effect is *Tapley* v. *Wainwright*, 5 B. & Ad. 395, 2 N. & M. 697. That was an action of trespass for breaking and entering two closes of the plaintiff. The defendant pleaded that *the said closes in which &c.* were from time immemorial parcels of a waste, and that the defendant had a prescriptive right of common in the waste, and entered at the times when &c. to use his right of common thereon; and because the closes in which &c. were wrongfully separated from the residue of the waste, he broke down the gates. The plaintiff replied that *the said closes in which &c.*, at the said times, were not wrongfully separated from the residue of the waste, but continually for twenty years and more, and before the first time when &c., had been and were separated and divided and inclosed from the residue of the waste, and occupied and enjoyed during that time

a right in both commons, the plaintiff must traverse the *whole* prescription: and the reason given for this is, that the defendant is bound to prove the prescription as laid. And this it was that the new rules were designed to remedy. I cannot see any distinction between a prescription and this mode of pleading the right.—*Erskine*, J., referred to *Vallance* v. *Savage*, 5 M. & P. 576, 7 Bing. 595.] There is nothing to warrant the limited finding. Suppose the defendant chooses to grub up the wood and lay down the close as a pasture, or convert it into arable, is he therefore to be deprived of the right of way to it? (166) The opinion of Chambre, J., in *Ballard* v. *Dyson*, 1 Taunt. 279, is strong to shew that proof of a restricted or limited right lies on the plaintiff. It would be extremely hard upon a defendant to hold that he is bound to prove an exercise of the right in every possible way.—At all events, the allegations in the second plea are capable of being taken distributively, and therefore, if it be necessary, the defendant is entitled to retain the verdict as entered on that plea. [*Tindal*, C. J.—Upon the evidence we probably should not have been dissatisfied with a verdict finding the general right in favour of the defendant: but the jury have not so found it; therefore all we can do is to direct the verdict to be entered distributively. It may perhaps be worth the defendant's while to go down to a new trial, in order to establish the general right.]

Kelly and *Gunning*, in support of the rule.—A prescriptive right must owe its origin to some grant: and the mode of user is strong evidence to shew the extent of the grant. In *Drewell* v. *Towler*, 3 B. & Ad. 735, in trespass for cutting lines of the plaintiff and throwing down linen thereon hanging, the defendant pleaded that he was pos-

(166) It was in evidence that the way in question was not the *only* way to the wood.

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sessed of a close, and because the linen was wrongfu
and upon the close he removed it; the plaintiff re
that J. G., being seised in fee of the close, and of a
suage with the appurtenances contiguous to it, by
and release conveyed to W. H. the messuage and a
easements, liberties, privileges &c. to the said mes
belonging or therewith then or late used &c., that, l
and at the time of such conveyance, the tenants and
piers of the messuage used the easement &c. of fast
ropes to the said messuage, and across the close, to
in the said close, in order to hang linen thereon, a
hanging linen thereon to dry, as often as they had occ
so to do, at their free will and pleasure, and tha
plaintiff, being tenant to W. H. of the said messuage
put up the lines &c.; the rejoinder took issue on the
as alleged in the replication: and it was held that
of a privilege for the tenants to hang lines across the
for the purpose of drying the linen of their own fa
only, did not support the alleged right. So, here
defendant having failed to sustain the right claim
his plea, the verdict should have been for the pla
unless the defendant is entitled to have it entered d
butively under the rules of Hilary Term, 4 Will. 4.
however, can only be done by amending the plea,
limiting the claim to the right found by the jury.
the defendant so pleaded in the first instance, the pla
might have new assigned. If the limited right is no
upon the record, how can the plaintiff anticipate tl
will be set up? The substantial question therefo
whether and upon what terms the court will allow
amendment. In *Cowling* v. *Higginson*, 4 M. & We
245, in trespass for breaking and entering a close, th
fendant pleaded (under the 2 & 3 Will. 4, c. 71) a rig
way for the occupiers of a close for twenty years, for h
carts, waggons, and carriages, at their free will and
sure: the replication traversed such right: and it

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held—first, that, under this issue, the plaintiff might shew that the defendant had a right of way for horses, carts, waggons, and carriages for certain purposes only, and not for all, and was not compelled to new assign; and might shew that the purpose for which the defendant had used the road, and in respect of which the action was brought, was not one of those to which his right extended—secondly, that evidence of user of a road with horses, carts, and carriages, for certain purposes, does not necessarily prove a right of road for all purposes, but that the extent of the right is a question for the jury under all the circumstances of the case.

TINDAL, C. J.—The defendant by his second plea claims a general right of way over the locus in quo, on foot, and with horses, cattle, carts, waggons, and other carriages, for himself and his servants, at all times of the year, at their free will and pleasure, for the more convenient occupation of his close called King's Haugh Wood: and, the jury having found that he had a special and limited right only, viz. for the carrying away timber and wood felled there, the question is whether we can, under the powers given by the rules of Hilary Term, 4 Will. 4, so mould the verdict as to give the defendant the benefit of this special finding. It appears to me that the rules will not warrant this. We have no power to enter a verdict for a qualified right which the plea does not set up. That which we are called upon to do is, not to limit the defendant to one of two rights which he has asserted, but to establish by this verdict a right of way for the exclusive purpose of conveying timber, &c., from the wood in question. That would, I think, be carrying the rule much further than has ever yet been done, and beyond the purpose for which it was made. If the defendant is anxious to have the limited right found by the jury, I think it will be meting out to him an ample measure of justice to permit him to amend

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his plea upon the same terms that an amendment have been allowed at the trial; and then the verdic be entered for him according to the finding of the on payment of costs: or he may go down to a ne upon the same terms.

VAUGHAN, J.—*Knight* v. *Woore*, 3 New Cases, Scott, 326, is plainly distinguishable from the p case. There the plea in effect involved two distinct i viz. upon the right to carry goods, and upon the ri carry water, and the finding of the jury was limited latter. But here the plea sets up a general right for all purposes, and the jury find that the defendan a qualified right only, viz. to cart away timber, a ri its very nature only exercisable at long intervals. I fore agree with the Lord Chief Justice, that the course will be to allow the defendant to amend his p as to make it conformable with the finding of the ju payment of costs, or to make the rule absolute for trial on payment of costs.

COLTMAN, J., concurred.

ERSKINE, J.—Upon the plea as it now stands, t fendant is clearly out of court, the right thereby s not having been proved.

The rule ultimately drawn up was as follo
That the defendant be at liberty to withdra first, third, and fourth pleas, and to amen second plea by stating his right according t finding of the jury, and in other respects should be advised, on payment of costs o trial and of the application and amendme twenty-one days; and that the plaintiff s be at liberty to reply de novo if he should

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fit; and that the verdict found for the defendant on the trial upon the issue joined on the second plea be set aside, and a new trial had upon the issue to be joined on the second plea as amended. And in case the defendant should not withdraw his first, third, and fourth pleas, and amend his second plea upon payment of costs as aforesaid within twenty-one days, then that the verdict found for him on the issue joined on the second plea on the trial already had be set aside, and entered for the plaintiff.

TOTTON, Demandant, VINCENT, Deforcient.

Tuesday, June 11th.

The court permitted a fine to be amended by introducing the name of an adjacent parish, the deed to lead the uses containing the words "or any other adjoining parish," the land appearing to have been intended to pass, and possession having gone accordingly.

BOMPAS, Serjeant, moved to amend a fine levied in Hilary Term, 49 Geo. 3, by the insertion of the parish of Ridgewell in the indentures of the fine. The property was described in the deed as a close called Boveley, in the parish of Great Yeldham, and all other the conusor's lands in the parish of Great Yeldham, or any other adjoining parish. The affidavit upon which the motion was founded stated that a small portion of the property intended to pass by the fine (and the possession of which had always gone consistently with the deed) was discovered to be situate in the adjoining parish of Ridgewell. The learned Serjeant submitted, that, inasmuch as the deed did not shew without the aid of the affidavit that the land in question was comprised in and intended to pass by the fine, the omission was not aided by the statute 3 & 4 Will. 4, c. 74, s. 7 (167).

TINDAL, C. J.—I scarcely think it necessary, but the amendment may be made.

Fiat.

(167) Which enacts, "that, *if it shall be apparent from the deed* declaring the uses of any fine already levied or hereafter to be levied,

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The court refused to disallow a commission for examining the plaintiff's witnesses abroad, though there had been great delay on his part; but they referred it to the Master to say whether or not the security the plaintiff had given for costs should not be increased.

De Rossi *v.* Polhill.

In this action, which was commenced in 1833, the p tiff, being a foreigner, was required to give securit costs, and on a former day in this term a rule nis obtained on his behalf for a commission to examine nesses at Dusseldorf, in Germany, and at Augsbu Bavaria.

Bompas, Serjeant, shewed cause, on the part of th fendant, suggesting that the great delay in proceeding the cause disentitled the plaintiff to the indulgence pr and he submitted, that, at all events, the amount o security ought to be increased, in order to meet the a vated costs that the commission must necessarily upon the defendant.

Swann was heard in support of the rule.

Per Curiam.—The delay on the part of the plai unexplained as it is, would certainly induce us to before we granted him a mere indulgence. But a

that there is in the indentures, record, or any of the proceedings of such fine, any error in the name of the conusor or conusee of such fine, or *any misdescription or omission of lands* intended to have been passed by such fine, then and in every such case the fine, without any amendment of the indentures, record, or proceedings in which such error, misdescription, or omission shall have occurred, shall be as good and valid as the same would have been, and shall be held to have passed all the lands intended to have been passed thereby, same manner as it would hav if there had been no such misdescription, or omission." 9th section provides "that n in the act contained shall le take away the jurisdiction court to amend any fine or co recovery [which is provided s. 8], or any proceeding t in cases not provided for act."

And see Lockington, Co Shipley and Wife, Conusees, 1 263.

now asks is, that he may be permitted to try his cause with effect. The rule must be made absolute, the commission to go out within a fortnight, and the sufficiency of the security already given for costs to be referred to the Master.

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DE ROSSI v. POLHILL.

Rule accordingly.

PORTER *v.* O'MEARA.

Tuesday, June 11th.

Upon reversing an outlawry on the ground that the defendant was abroad at the time the proceedings were had against him, the court will not require him to give bail. But it should distinctly be shewn by affidavit (properly, of the defendant himself) that the defendant was out of the kingdom at the time of the issuing of the exigent.

WILDE, Serjeant, on a former day in this term, obtained a rule calling upon the plaintiff to shew cause why the outlawry of the defendant should not be reversed, upon the defendant's entering a common appearance, on the ground that the defendant was abroad at the time the proceedings in the outlawry were taken against him. The affidavit (of the defendant) upon which the motion was founded, stated that he was residing at Boulogne from December, 1836, until April, 1839, with the exception of occasional visits to England. The writ of capias issued on the 28th April, 1837; the first writ of exigent issued on the 18th May, in the same year, and was returnable on the 9th June; and in August or September the proceedings to outlawry were completed.

F. Kelly and *Channell* now shewed cause, upon (amongst others) an affidavit of one Hyde, who swore that he was in the service of Captain Williamson, of Brooklands Park, near Southampton; that the defendant was repeatedly at his master's house; that the deponent was at the Epsom races on the 25th May, 1837, and there saw the defendant: and also upon an affidavit stating that the book kept at Boulogne for the purpose of noting the embarkations thence of British residents, contained an entry of the defendant's having left that place for Dovor on the 23rd May, 1837.—To entitle him to a reversal of the outlawry on motion, it

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is incumbent on the defendant to satisfy the cour positive affidavit that he was abroad *at the time of the i of the exigent—Richardson* v. *Robinson,* 5 Taunt. 309 the affidavit should be such that if untrue an indic for perjury might be sustained upon it. Here the d ant does not swear that he was out of the jurisdict the court at the material time: but, on the other h is sworn that he was seen in this country about th when his being here would render the proceedings re Formerly, upon the reversal of a writ of error, up ground of the defendant's absence from England, t fendant was required to give bail; but now, under tl 2 Vict. c. 110, he is entitled to the same indulgence entering a common appearance—*Harvey* v. *O'Mea* Dowl. 725. But there it was sworn positively tha defendant was absent from England at the time award of the exigent. All that was decided there that, the defendant being entitled to his writ of err that would have been required of him before the s was to put in bail in the alternative; and therefore, the statute, he was entitled to be relieved from the out without giving bail.

Bompas, Serjeant, and *Wightman,* in support of the The defendant would be entitled ex debito justitiæ reversal of this outlawry upon a writ of error; and t fore the court will give him the same relief on m Formerly bail was required on reversing an outlaw those cases only where the action was commenced by able process—*Campbell* v. *Daley,* 3 Burr. 1920; *Cracr Gledowe,* 3 Burr. 1482; *Matthews* v. *Gibson,* 8 East, *Havelock* v. *Geddes,* 12 East, 622; *Serocold* v. *Hampse* East, 624, n. (168); *Graham* v. *Grill,* 1 M. & S. 409;

(168) Serecole v. Hanson, 1 Wils. 3, Serecold v. Hamson, 2 Str. 1

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v. *Wood*, 4 Taunt. 691; *Richardson* v. *Robinson*, 5 Taunt. 309; *Bryan* v. *Wagstaffe*, 8 D. & R. 208, 5 B. & C. 314, R. & M. 329, 2 C. & P. 125. Since the late statute no action is bailable save under certain circumstances; therefore the defendant is now entitled to stand before the court as if this action were commenced by process non-bailable. Then, the affidavits produced in answer to the motion plainly shew that the defendant was in fact at Boulogne on the 18th May, when the writ of exigent was issued; for, it appears that he did not quit that place until the 23rd. [*Tindal*, C. J.—I think it is to be inferred from the affidavits on both sides that the defendant was abroad on the 18th May; but, at the same time, it would be more satisfactory to have that fact positively sworn to.]

An affidavit was then made by the defendant's wife, who happened to be in court, stating that the defendant was residing with her at Boulogne on the 17th, 18th, and 19th May, 1837.

TINDAL, C. J.—If the defendant was out of the jurisdiction of the court at the time of the issuing the writ of exigent, he is clearly entitled to set aside the proceedings upon a writ of error coram nobis. Though not very well pleased with the defendant's loose affidavit, yet, the material fact having been now supplied, I think the rule for reversing the outlawry must be made absolute, on payment of the costs of the proceedings and of this application, and entering a common appearance.

Rule absolute accordingly (169.)

(169) See the next case.

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Upon reversing an outlawry on the ground that the defendant was abroad at the time the proceedings were had against him, the court will not require him to give bail.

But it should distinctly be shewn by affidavit (properly, of the defendant himself) that the defendant was out of the kingdom at the time of the issuing of the exigent.

GILL *v.* TYSTE.

WILDE, Serjeant, on a former day in this ter tained a rule nisi to reverse the outlawry in this c the ground that the defendant was out of the c whilst the proceedings were pending. The rule w tained upon the affidavit of the defendant's attorne stated that the defendant went abroad on or abo 14th November, 1837, and remained absent from land till the 10th May, 1839. The proceedings wer menced on the 18th November, 1837, and compl the course of the year 1838.

F. Kelly shewed cause.—The court will not be s with the mere affidavit of the attorney, but will requi of the party himself, who alone can state with certai period of his absence from this country. The plai at least entitled to have an affidavit upon which if f may prefer an indictment. In *Porter* v. *O'Meara* p. 838, the court required an affidavit to be made wife of the defendant, who happened to be in cou who was living with him during the time to which t ceedings had relation. At all events, this applicati only be granted on payment of costs, as in *Po O'Meara*, and *Harvey* v. *O'Meara*, 7 Dowl. 725.

Wilde, Serjeant, in support of his rule.—In a case this morning the court of Exchequer receiv affidavit of the defendant's attorney. [*Tindal*, C. think the defendant should have made an affidavit: b this affidavit of his attorney is rather loose as to If the court require it, the defendant's affidavit procured and the rule may be drawn up on the p tion of that affidavit. [This course was assented There is no pretence for calling upon the defend

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pay costs, the proceedings against him having been irregular.

THE COURT, referring to *Graham* v. *Grill*, 1 M. & S. 409, and *Hesse* v. *Wood*, 4 Taunt. 691, made the rule absolute on payment of costs of the outlawry and of the application.

Rule absolute.

Kelly then moved that the defendant might be detained under the 1 & 2 Vict. c. 110, ss. 3, 7: but the court declined to interfere (170).

(170) See the first part of the judgment of Coleridge, J., in Harvey *v.* O'Meara, 7 Dowl. 725.

JAMES *v.* ATTWOOD.

Wednesday, June 12th.

BY the 3 & 4 Will. 4, c. 42, s. 39, it is enacted that "the power and authority of any arbitrator or umpire appointed by or in pursuance of any rule of court or judge's order, or order of Nisi Prius, in any action now brought or which shall be hereafter brought, or by or in pursuance of any submission to reference containing an agreement that such submission shall be made a rule of any of his majesty's courts of record, shall not be revocable by any party to such reference, without the leave of the court by which such rule or order shall be made, or which shall be mentioned in such submission, or by the leave of a judge; and the arbitrator or umpire shall and may and is hereby required to proceed with the reference notwithstanding any such revocation, and to make such award, although the person making such revocation shall not afterwards attend the reference; and that the court, or any judge

The 3 & 4 Will. 4, c. 42, s. 41, which empowers arbitrators or umpires to swear witnesses, does not exclude the power of the court or a judge to administer the oath.

To induce the court to permit a party to rescind his submission, under s. 39, strong grounds must be laid before them.

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thereof, may from time to time enlarge the term for any such arbitrator making his award."

And by the 41st section it is enacted, that, "when in any rule or order of reference, or in any submission to arbitration containing an agreement that the submission shall be made a rule of court, it shall be ordered or agreed that the witnesses upon such reference shall be examined upon oath, *it shall be lawful for the arbitrator or umpire, or any one arbitrator, and he or they are hereby authorized and required, to administer an oath to such witnesses*, or to take their affirmation in cases where affirmation is allowed by law instead of oath; and if upon such oath or affirmation, any person making the same shall wilfully and corruptly give any false evidence, every person so offending shall be deemed and taken to be guilty of perjury, and shall be prosecuted and punished accordingly."

Halcomb, on a former day, moved for a rule calling upon the defendant to shew cause why the plaintiff should not be at liberty to revoke his submission to arbitration in this case, or why the order of reference should not be set aside or amended, by directing the arbitrators or umpire to administer the usual oath to the parties and their witnesses under the statute.—The motion was founded upon affida-

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the act gives the arbitrator no power to swear the *parties* but only the *witnesses*.] If the parties are examined, they are to all intents and purposes witnesses: and it is quite clear that an indictment for perjury would not lie for false evidence given under such circumstances (171). At all events, sufficient ground is laid for rescinding the submission.

TINDAL, C. J.—It appears to me that no sufficient ground is laid for rescinding the submission in this case. The object of the 3 & 4 Will. 4, c. 42, s. 39, was, to put a stop to a practice that had become so common, of revoking the submission whenever there was reason to believe that the arbitrator's impression was unfavorable (172). To induce us to grant leave to revoke, a very strong case should be made out. Now, the grounds relied upon here are—first, that the choice of the umpire was decided by lot. Undoubtedly the mind and understanding of the two arbitrators should concur in the selection of the person who is to act as umpire: but it appears to me that the case falls within that of *In re Tunno & Bird*, 5 B. & Ad. 488, 2 N. & M. 328, where it was held that a party to an arbitration cannot object to the award, that the arbitrators chose an umpire by lot, if he expressly agreed to or acquiesced in that mode of choice (173). The other ground is so absurd that it can hardly be necessary to advert to it at all. It is impossible for a moment to suppose that the judgment of

(171) See Calliand v. Vaughan, 1 B. & P. 210; and The King v. Aylett, 1 T. R. 63, where Lord Mansfield says: "In the case of perjury, I take the circumstances requisite to be these; the oath must be taken in a judicial proceeding, before a competent jurisdiction; and it must be material to the question depending."

(172) See Clarke v. Stocken, 3 Scott, 90, 94.

(173) And see In re Cassell, 9 B. & C. 624, where it was held that the choice of an umpire by lot is bad, and that the appointment must be the act of the will and judgment of the two arbitrators, "unless the parties consent to or acquiesce in some other mode."

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any gentleman who is called upon to perform the of an umpire can be biased by the circumstance o having for a pupil the son or the nephew of one o parties concerned in the reference.

We are, however, disposed to grant a rule nisi to a the order of reference, that the witnesses may b sworn, and an opportunity given for their cross-e nation.

Sir F. Pollock and *Halcomb*, who appeared to su the rule, referred to *Hodsoll* v. *Wise*, 4 M. & Welsby, where a cause was referred at Nisi Prius, by an ord reference which stated "that the witnesses should b mined upon oath, to be taken before me (the jud assize) or some other judge of the court of Exchequ before a commissioner appointed to take affidavits i same court;" and it was held that this clause did n clude the general power of the arbitrator to admi an oath to such witnesses, under the 3 & 4 Will. 4, s. 41.

Wilde, Serjeant, and *Whately*, for the defendan sented to the amendment proposed; and the rul accordingly made absolute.

Rule absol

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The rule of Hilary Term, 4 Will. 4, V. 3, dispenses with the *rule* to join in demurrer, but not with the demand of a joinder.

BILLING *v.* KIGHTLEY.

THE plaintiff delivered a demurrer to the defen plea, and made up the issue and set the demurrer for argument without demanding a joinder in dem whereupon—

Wilde, Serjeant, on a former day in this term, obt a rule nisi to set aside the joinder in demurrer and

quent proceedings, for irregularity—citing *Baylis* v. *Hayward*, 3 Dowl. 533, and the rule of Hilary Term, 4 Will. 4, V. 3, which provides that "no *rule* for joinder in demurrer shall be required, but the party demurring may demand a joinder in demurrer, and the opposite party shall be bound within four days after such demand to deliver the same, otherwise judgment."

Stephen, Serjeant, now shewed cause.—Though the plaintiff could not have signed judgment for want of a joinder in demurrer, without a previous demand of a joinder, yet he was not bound to make it; for, unless the word "may" in the new rule be read "must," there is nothing in that rule to shew that a demand is necessary; and the joinder in demurrer not requiring counsel's signature, there can be no reasonable objection to the course that has been adopted here.

Wilde, Serjeant, in support of his rule.—Prior to the rule of Hilary Term, 4 Will. 4, a demand of a joinder in demurrer could not be availably made without a rule to join in demurrer: all that the rule dispenses with is, the rule to join in demurrer, leaving it still incumbent upon the opposite party to demand a joinder.

TINDAL, C. J.—Before the rule of Hilary Term, 4 Will. 4, a rule to join in demurrer, as well as a demand of a joinder, was necessary. The fair construction of that rule is, that the *rule* shall be dispensed with, but not the *demand*. A contrary interpretation of the new rule would deprive the defendant of an opportunity of applying for leave to amend.

The rest of the court concurring—

Rule absolute.

1839.

Wednesday, June 12th.

The usual service in ejectment may be dispensed with, where prevented by the violence of the tenant in possession.

DOE *d.* ROSS *v.* ROE.

HOGGINS moved for judgment against the casual tor, upon an affidavit stating that the party who we serve the declaration and notice upon Mary Wilson, tenant in possession, was prevented by the violent duct of herself and her son from reading over the san her.

Knowles shewed cause, upon an affidavit stating the party who went to the premises for the purpo serving the declaration and notice, threw the same the house, but neither read nor offered to read or ex the contents thereof to the tenant.

TINDAL, C. J.—I am of opinion that no sufficient c has been shewn against the rule for judgment against casual ejector in this case. The party was prevente the violent conduct of the tenant from effecting the se in the usual way.

The rest of the court concurring—

Rule absolut

Wednesday, June 12th.

A motion to change the venue cannot be made until after issue joined.

GRIFFIN *v.* WALKER.

WILDE, Serjeant, shewed cause against a rule obta by *Martin* for changing the venue, on special grou The rule was opposed on the ground that the applica was made before issue joined—*Wetherby* v. *Goring*, & R. 441, 3 B. & C. 552; *Youde* v. *Youde*, 4 Dowl. 32; v. *Harrison*, 4 Dowl. 181, 2 C. M. & R. 733, 1 Tyr. & 193.

1839.

GRIFFIN v. WALKER.

Martin was heard in support of his rule.

PER CURIAM.—Issue not having been joined, the application to change the venue is premature.

Rule absolute.

CROFT *v.* LORD PERCIVAL.

Wednesday, June 12th.

This court has no power to order the sheriff to restore money levied under a capias utlagatum, on the reversal of the outlawry: the application should be for an amoveas manus in the court of Exchequer.

IN Michaelmas Term last an outlawry against the defendant at the suit of the plaintiff was set aside, the defendant having become a peer. A sum of 1200*l.*, which was in the hands of the defendant's bankers at the time of the outlawry, had been seized by the sheriff under the capias utlagatum.

Wightman, on a former day in this term, upon an affidavit that the outlawry had been set aside, obtained a rule to shew cause why the above-mentioned sum should not be restored to the defendant.

F. Kelly, shewed cause.—The defendant has mistaken his course. This court, to whom the sheriff is not accountable in the matter, has no power to interfere. The sheriff is bound to pay over the money to the Exchequer. [*Tindal*, C. J.—How has the sheriff returned?] That does not appear. The money is forfeited to the Crown. The defendant should have applied to the court of Exchequer for a writ of amoveas manus. Tidd's Practice, 9th edit. 144.

Wightman, in support of his rule.—If the money remains in the sheriff's hands, and the authority under which he obtained possession of it is removed from him, he has no pretence for retaining it.

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CROFT v. LORD PERCIVAL.

TINDAL, C. J.—The moment the sheriff seizes the capias utlagatum, he is accountable to the (The defendant should at least have shewn that the been no inquisition. If the money is the property defendant, he has his remedy for the recovery of it. I think we cannot summarily interfere, unless v quite clearly that the sheriff is our officer in the ma

The rest of the court concurring—

Rule dischar

Wednesday, June 12th.

To induce the court, on a summary application, to set aside a plea of a release by one of two co-plaintiffs, it must be clearly shewn that the release has been obtained by fraud between the releasor and the defendant.

J. C. CROOK and GEORGE CROOK *v.* STEPHENS.

JAMES, in Hilary Term last, obtained a rule callin the defendant to shew cause why his plea of releas one of the two co-plaintiffs should not be set asid why he should not pay the costs of the applicatio appeared from the affidavits that the action was b upon a covenant by the defendant with the two pla contained in a deed of composition entered into b Crook, one of the plaintiffs, as the principal debto his brother George Crook, the other plaintiff, as his a in October, 1834, with the creditors of the forme which deed the defendant, as one of such creditors, nanted to pay the plaintiffs the excess beyond 20*s.* pound which he might receive from any other part certain bills of exchange of which the defendant wa the holder, and assigning a breach by the receipt part of the defendant of two sums of 145*l.* and up and 48*l.* and upwards, from certain other parties bills of exchange included in the deed of compositio which declaration the defendant, amongst other plea in a plea of a release given by George Crook, the s one of the co-plaintiffs, since the action was brough further appeared by the affidavits, that J. C. Croo

been insolvent in 1834, and again in August, 1838; that Messrs. Brown & Bagshaw had acted as accountants for the estate on both occasions; that, by a deed of June, 1838, J. C. Crook had, for the considerations therein stated, assigned to Brown & Bagshaw all the debts contained in a schedule to that deed, of which the debt sought to be recovered in this action was alleged to be one; that this assignment was made with the knowledge and assent of the trustees of J. C. Crook under his second insolvency; that the action was brought for the benefit of Brown & Bagshaw; and that George Crook had by letter authorized the use of his name as joint plaintiff.—*Mountstephen* v. *Brooke*, 1 Chit. 390, and *Johnson* v. *Holdsworth*, 4 Dowl. 63, were cited: in the former of which a plea puis darrein continuance of a release by one of several plaintiffs was set aside without costs, on the terms of an indemnity being given to the plaintiff who had released the action, although the consent of such plaintiff had not been obtained before the action was brought, it appearing that no consideration had been given for the release, and that the plaintiffs sued as trustees for the creditors of an insolvent person; and in the latter, the court of King's Bench set aside a plea of a release of the cause of action by one of several plaintiffs, assignees of a bankrupt, suspicion being thrown on the defendant's conduct in the transaction, the co-plaintiffs indemnifying the plaintiff who had given the release against costs.

Talfourd, Serjeant, *R. V. Richards*, and *Whitehurst*, in Easter Term, shewed cause, upon affidavits contradicting the fact that the debt for which the action was brought was included in the schedule of the deed of June, 1838, or that the assignment was made with the assent of the trustees; and alleging that George Crook had, upon the application of Bagshaw, allowed his name to be used, in ignorance of any assignment having been made to him and

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CROOK v. STEPHENS.

Brown, and believing the application to have been by them as accountants to the estate, with a view recovery of the money for the trustees; that, after th of October, 1834, subsequent dealings took place be J. C. Crook and the defendant, viz. in the years 1834, and 1836, in the course of which J. C. Crook b largely indebted to the defendant; that an agreeme entered into between them, that the excess received bills whereof the defendant was the holder should tained by him in satisfaction of the new debt, ar residue retained as a security for liabilities incurr the defendant; and that, after allowing the whole monies and dividends received since the execution deed of October, 1834, J. C. Crook still stood indeb the defendant to the extent of 644*l.*—In order to i the court to interfere, it must be made appear th release is founded in fraud, that the action is pr brought, and that the party who makes the appli does it fairly and honestly, and without concealin material fact—*Jones* v. *Herbert*, 7 Taunt. 421. In *H* v. *Piggott*, 2 Dowl. 392, 2 C. & M. 384, 4 Tyr. 285, an action was brought by two of four executors, fo balance of an account, and the other two executors rel the action, which release was pleaded puis darrein tinuance, the court of Exchequer refused to set it Bayley, B., there says: "Two of the executors m claim on the defendant for a sum of nearly 100*l.* defendant pleads a release by the two other exec given by them at their own suggestion, and witho interference of the defendant. They are co-executors the plaintiffs, and properly they ought to have bee plaintiffs. If there had been a strong case of fraud out, the case in the Common Pleas, of *Jones* v. *He* would have been in point. An action may be oppre as well as a release fraudulent." Here, George Crool perfectly justified in giving the release: the acti

brought in violation of the agreement entered into between J. C. Crook and the defendant; and George Crook's consent to his name being used was obtained by a concealment of the fact that the action was brought for the benefit of Brown & Bagshaw, whose right to take the assignment, regard being had to the character they filled, may very well be doubted.

Wilde, Serjeant, and *James*, in support of the rule.—George Crook had no such interest in the question as to entitle him to recall the assent he had given to his name being used as a co-plaintiff in the action; and this is not the proper mode of trying the validity of the assignment to Brown & Bagshaw. A party who takes upon himself to execute a release is bound to shew to the court that he has some just reason for so doing: and it is enough for the party who seeks to set it aside, to shew reasonable ground of suspicion—*Johnson* v. *Holdsworth*, 4 Dowl. 63. In *Legh* v. *Legh*, 1 B. & P. 447, it was held, that, if the obligor of a bond after notice of its being assigned take a release from the obligee, and plead it to an action brought by the assignee in the name of the obligee, the court will set the plea aside. And Eyre, C. J., said: "The court has in many cases refused to allow a party to take his legal advantage, where it has appeared to be against good faith. Thus, we prevent a man from signing judgment who has a right by law to do so, if it would be in breach of his own agreement. In order to defeat the real plaintiff, this defendant has colluded with the nominal plaintiff to obtain a release; and I think therefore the plea of release may be set aside consistently with the general rules of the court."

Cur. adv. vult.

Lord Chief Justice TINDAL now delivered the judgment of the court:—

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This is a rule calling on the defendant to shew why his plea of release from one of the two co-pl should not be set aside, and why he should not costs. The action is brought upon a covenant by fendant with the two plaintiffs, contained in a composition entered into by J. C. Crook, one of the tiffs, as the principal debtor, and his brother Crook, the other plaintiff, as his surety, in October with the creditors of the former; by which deed, fendant, as one of such creditors, covenanted to plaintiffs the excess beyond 20s. in the pound wh might receive from any other parties to certain bills change of which the defendant was then the holde assigning a breach by the receipt on the part of fendant of two sums of 145*l.* and upwards, and 4 upwards from certain other parties to the bills change included in the deed of composition: to declaration, the defendant, amongst other pleas, p plea of a release given by George Crook, the surety, the co-plaintiffs, since the action was brought. A question before us is, whether, upon the several facts upon the affidavits which have been produced bef we should be justified, upon a summary applicati setting aside the plea of release which has been put the record by the defendant.

The rule by which courts of law have felt them governed in this respect has been, that, whenever made clear to the court on the part of the plaintiff th release has been obtained by fraud between the re and the defendant, in such case, and in such case the court will feel itself warranted, on a summary cation, to interfere and set the release aside. This laid down distinctly in the case of *Jones* v. *Herb* Taunt. 421, in *Acton* v. *Booth*, 4 Moore, 192, in *H* v. *Piggott*, 4 Tyr. 284, and in other cases. The qu therefore is, whether upon the present occasion th

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such clear evidence of fraud on the part of George Crook, the releasor, and the defendant, as to require us to interfere: and we think there is not.

In the first place, so far as relates to Stephens, the defendant, it is stated in the affidavits, that, after the deed of composition of 1834, subsequent dealings in the years 1834, 1835, and 1836, took place between J. C. Crook and the defendant, in the course of which J. C. Crook became largely indebted to the defendant; and that an agreement was entered into between them, that the excess received on the bills whereof Stephens was the holder should be retained in payment of this new debt, and the residue retained as a security for liabilities incurred by the defendant; and it is in such affidavit stated, that, after allowing the whole of the said monies and dividends received by the defendant since the first insolvency of J. C. Crook, the said J. C. Crook is still indebted to him the defendant in the sum of 644*l.*

In the next place, this action is not brought for the benefit of the two plaintiffs, or either of them, but of Brown & Bagshaw, persons who had been employed as accountants to the estate, both before the second insolvency, and also under the said second insolvency of J. C. Crook, in August, 1836: and it appears by the affidavits, that, in June, 1838, J. C. Crook, for the consideration of 60*l.* therein mentioned, assigned to Brown & Bagshaw all the debts contained in a schedule to that deed. One question of fact raised upon this part of the case, is, whether the particular debt now sought to be recovered was included or not in such schedule and purchase. It is affirmed to have been included, on the part of Brown & Bagshaw; it is denied, on the part of the defendant. And, again, upon this part of the case, another question also is raised—whether the purchase was made with the knowledge and assent of the four trustees under the second deed of composition, or of some of them only. This also is the

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subject of affirmation on the one side and denial o other. And, in the course of the argument, a sti ther point has been raised and argued before u whether persons acting in the character of accounta an insolvent's estate can be allowed by a court of to become the purchasers of debts due to the est the insolvent, or whether such purchase would not aside by such court. And, although great stress wa by Brown & Bagshaw on the letter written by C Crook on the 28th July, by which he authorized th of his name as a joint plaintiff, it is fully met b affidavit of George Crook that he did this on th plication of Bagshaw, in ignorance of any assig to him and his partner, and believing the appli to have been made by them as accountants t estate, with a view to receiving the money fo trustees.

In a case circumstanced like the present, we cann with sufficient clearness and distinctness that the r was obtained by fraud on the part of the defendant, to justify us, on the authority of the decided cas interfering summarily; and we think it far from on the contrary, that his object might not be to pr what he thought was a fraud from being committed. therefore think the rule must be discharged, in the in which it is drawn up, that is, with costs.

Rule discharged, with co

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MUSKETT *v.* HILL and TOZER.

Wednesday, June 12th.

A licence to mine and search for minerals and to carry away the same and to convert them to the grantee's use, conveys to the grantee an interest that is capable of being assigned.

A mining licence contained a covenant on the part of the grantees constantly and bonâ fide to mine and search for all lodes, veins, and strata of metallic minerals within the limits described, and effectually to work according to the laws of good mining; with a proviso, that, if there should be any failure or breach by the grantees or their assigns in the performance of any of the covenants (amongst others, a failure, after notice so to work, to keep six able miners constantly employed in driving the adits or sinking the deepest level), and notice in writing should be fixed within the limits that the grantors intended to avoid the licences thereby granted because of such failure or breach, then, after the expiration of one month from the affixing such notice, and as often as the same should happen, notwithstanding the waiver of any prior forfeiture, it should be lawful for the grantors to re-enter &c.; and that after such re-entry the licences should be conclusively determined and avoided. The grantees having failed to mine according to their covenant, the grantors on the 6th April, 1836, affixed on the mine a notice, that, unless the grantees did thenceforth keep six able miners constantly employed in driving the adits and sinking the deepest level, and in all other respects work all lodes, veins, and strata of metallic minerals within the limits, according to the true intent and meaning of the covenant above set forth &c., the grantors *would*, in pursuance of the above proviso, after the expiration of one month from the affixing of the said notice, re-enter into the premises, and avoid and determine all the licences and authorities granted and demised by the indenture, and would eject and expel all persons claiming under the authority of the said indenture:—Held, that this was not a sufficient notice to determine the interest created by the indenture.

And held that an action on the case was maintainable against the grantors for expelling the assignee and his workmen, and forcibly preventing them from having access to or working the mine.

The third plea stated that the rights, shares, and interests of the grantees did not, nor did any of them, become vested in the plaintiff. The evidence was, that the assignment to the plaintiff was executed by one of the grantees *before*, and by the other *after* the re-entry by the grantors:—Held, that, there having been a subsequent general refusal to allow the plaintiff and his workmen to enter and search for ore, the plaintiff was entitled to recover upon this issue.

THIS was an action upon the case for the obstruction of the plaintiff in the exercise and enjoyment of certain licences and authorities to work certain mines. The plaintiff, in his declaration, after setting out, that, by an indenture between the defendant Hill of the first part, the defendant Tozer of the second part, and certain persons of the names of Setree and Stacey of the third part, the defendants, according to their interests, granted to Setree and Stacey, their executors, administrators, and assigns—first, licence and authority to mine and search for, or cause to be raised, sought for, brought to grass, and made merchantable, all tin and tin ore, &c., within certain lands therein described—secondly, licence and authority to carry away the said metallic minerals, and convert them to their own use, with other licences not material to the present question, to hold for twenty-one years from the 13th February, 1835, and further setting out an assignment by

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Covenant No. 1. The covenant referred t
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MUSKETT v. HILL.

the indenture of assignment was not the deed of Setree and Stacey—thirdly, that the rights, shares, and interests of Setree and Stacey did not nor did any of them become vested in the plaintiff, nor did the plaintiff at any time after the making of the second indenture commence the exercise and enjoyment of the same, nor was the plaintiff, at the time of the committing of the grievances complained of, employed in using or enjoying the same. Third plea.

The fourth plea stated, that, during the term granted, and before the making of the indenture secondly mentioned, to wit, on the 1st January, 1836, and from thence until the 6th April, and the affixing of the notice as after mentioned, Setree and Stacey did not nor would constantly and bonâ fide mine and search for &c. all lodes &c., and so set out a breach of the covenant No. 1, and stated that the said covenant during all the time aforesaid continued and remained unbroken, and that thereupon the defendants during the continuance of the said term, to wit, on the 6th of April, caused notice in writing to be affixed within the limits, to wit, on a certain whin (being the principal erection or building within the limits), and thereby gave notice to the said Setree and Stacey, and to all others whom it might concern, so to work, and that, unless they did thenceforth keep six able miners constantly employed in driving the adits or sinking the deepest level within the said limits, and also in all other respects work all lodes, veins, and strata of all metallic minerals within the said limits, according to the true intent and meaning of the covenant No. 1, and observe and perform all other the covenants in the first-mentioned indenture contained on the part of the said Setree and Stacey, the defendants would, in pursuance of the said proviso, after the expiration of one month from the affixing of the said notice within the limits aforesaid, re-enter into the said limits and premises, and avoid and determine all, every, and singular the licences and authorities by the Fourth plea.

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MUSKETT v. HILL.

said first-mentioned indenture to them granted and mised, and eject and expel from the same limits all pe claiming under the authority of the said indenture was then averred that Setree and Stacey did not, no the plaintiff, or any other person, from and after the ing of such notice, keep six able miners constantly ployed in driving the adits or sinking the deepest within the said limits, nor work nor search for rals, according to the true intent and meaning of the first-mentioned indenture, and of the covenants, pro and agreements therein contained; but that they w fully failed after such notice and affixing so to do, trary to the said covenant and proviso, for a longer than one month after the affixing of the said noti aforesaid. And the defendants further said, that, wards, and after the expiration of one month fron affixing of such notice as aforesaid, and during the tinuance of the estate of the grantor William Hill, six able miners not having been kept and employ any person or persons as aforesaid, and the said cov being so broken as aforesaid, the defendants, in pursu of the power contained in the first-mentioned indentu the said first day when &c., entered into the said tene and premises thereby granted, and the same had repossessed, and enjoyed, as absolutely forfeited, and determined the said licences and authorities. An plea then proceeded upon this ground to justify the s other grievances mentioned in the declaration: and th further stated that the indenture secondly mentione not within six months from the date thereof tendere registry to the defendants, their stewards, agents, or tors, according to the proviso in the first-mentioned i ture contained.

Replication to the fourth plea.

The plaintiff joined issue on the first three pleas pleaded in reply to the fourth plea, that Setree and S did from and after the affixing of such notice as in

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plea mentioned, keep six able miners constantly employed in driving the adits and sinking the deepest level within the said limits &c., and did work and search for minerals according to the true intent and meaning of the indenture and the covenants therein contained.*

The cause was tried before Lord Denman at the Spring Assizes at Exeter in 1838, when the following facts appeared in evidence:—By indenture of the 18th August, 1835, between the defendant Hill of the first part, Tozer of the second part, and Setree and Stacey of the third part, the defendants, according to their respective interests, demised and granted to Setree and Stacey, their executors, administrators, and assigns, amongst other things, licence and authority to mine and search for, or cause to be raised, sought for, brought to grass, and made merchantable, all tin and tin ore within certain lands therein described, and also to carry away the said metallic minerals and convert them to their own use—rendering therefor to the grantors a certain portion of the produce (with a proviso that such licences and authorities should be assignable by deed)—to hold the same for twenty-one years from the 13th February, 1835; Setree and Stacey covenanting (among other things) constantly and bonâ fide to mine and search for all lodes, veins, and strata of metallic minerals within the limits described, and effectually to work the same according to the laws of good mining: with a proviso, that, if there should be any failure or breach by Setree and Stacey or their assigns in the performance of any of the covenants—and, as to the covenant above set forth, a failure (after notice so to work) to keep six able miners constantly employed in driving the adits or sinking the deepest level, was to be considered one of the breaches thereof—and notice in writing should be fixed within the limits described that the grantors intended to avoid the licences thereby granted because of such failure or breach, then, after the expiration of one month from the affixing of such notice, and as often

Licence to Setree and Stacey.

Covenant by Setree and Stacey.

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as the same should happen, notwithstanding the wai any prior forfeiture, it should be lawful for the grant re-enter, and after such re-entry the licences shou conclusively determined and avoided.

Notice.

The grantees of the licence, Setree and Stacey, h failed to mine according to the covenant above set the defendants, on the 6th April, 1836, caused to be a on the whin of the mine a notice addressed to Setre Stacey, and all others whom it might concern, const and bonâ fide to mine and search for all lodes, veins strata of metallic minerals within the limits describe effectually to work according to the laws of good mi and that, unless they did thenceforth keep six able m constantly employed in driving the adits or sinkin deepest level within the said limits, according to th intent and meaning of the covenant above set forth observe and perform all other the covenants in the i ture of the 18th August, 1835, the defendants woul pursuance of the above proviso, after the expiration o month from the affixing of the said notice, re-enter the said premises, and avoid and determine all the lic and authorities granted and demised by the said inden and would eject and expel all persons claiming unde authority of the said indenture.

Negotiations took place between the defendants Setree and Stacey; and ultimately the plaintiff be possessed of the interest of the latter in the premise an assignment which was executed by Stacey on the April, 1836, and by Setree on the 27th of July.

Expulsion of plaintiff.

On the 8th July, six men not having been kept at within a month after the notice, the defendants en into possession, expelling the workmen found there, refused to allow the plaintiff or his workmen to ente the purpose of mining.

A verdict having been found for the plaintiff on the second, and third pleas, and for the defendants on fourth—

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MUSKETT v. HILL.

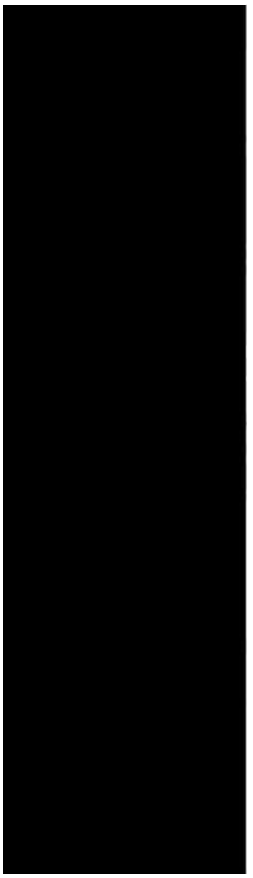
Bompas, Serjeant, in Easter Term, 1838, obtained a rule nisi to enter judgment for the plaintiff on the fourth issue non obstante veredicto, on the ground that the notice therein set forth was not a notice absolutely to determine the interest of the lessees, Setree and Stacey, in the mine, by reason of a breach of covenant already incurred, but merely a conditional notice that the grantors would determine the interest unless the covenant to work with six able miners were performed—leaving it wholly uncertain whether or not they would act upon such notice; and also for a new trial, on the ground that the evidence did not sustained the fourth plea (174).

Wilde, Serjeant, *Erle*, *Crowder*, and *Butt*, in Michaelmas and Hilary Terms last, shewed cause.—1. The interest of the grantees, Setree and Stacey, in the license, was not of such a nature as to be capable of passing by assignment, and therefore the issue on the third plea ought to have been found for the defendants (175). A mere licence to work mines conveys no estate—per Lord Eldon, in *Norway* v. *Rowe*, 19 Ves. 158. In *Doe* d. *Hanley* v. *Wood*, 2 B. & A. 724, the owner of the fee granted to A., his partners, fellow adventurers, &c., free liberty to dig for tin and all other metals throughout certain lands therein described, and to raise, make merchantable, and dispose of the same to their own use, and to make adits &c. necessary for the exercise of that liberty, together with the use of all waters and watercourses, excepting to the grantor liberty for driving any new adit within the lands thereby *granted*, and to convey any watercourse over the premises *granted*, haben-

1. Interest of the grantees not assignable.

(174) This part of the motion was founded upon affidavits, upon which it in the result became unnecessary to give any opinion.

(175) This point did not properly arise upon the form of the rule, but was let in by agreement of the parties, for the sake of convenience.



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tion thereof, or in any part of the ore, metals, or minerals ungot therein; but he had a right of property only as to such part thereof as upon the liberties granted to him should be dug and got. That is no more than a mere right to a personal chattel, when obtained in pursuance of incorporeal privileges granted for the purpose of obtaining it, being very different from a grant or demise of the mines, or metals, or minerals, in the land; and is such a right only as under the circumstances stated in this case is not sufficient to support the present action of ejectment." It is clear, therefore, that this instrument, though the words "demise and grant" are used, did not convey to the grantees an interest that could pass by assignment. *Chetham* v. *Williamson*, 4 East, 469, 1 Smith, 278, *Flight* v. *Glossop*, 2 Scott, 220, 2 New Cases, 125, and the authorities collected in Smith's Leading Cases, 22, are to the same effect. But, supposing the interest of Setree and Stacey to be assignable, this is not a covenant running with the land, to constitute which there must be a privity of estate between the contracting parties—*Spencer's* Case, 5 Rep. 16. b.; 1 Wms. Saund. (note to *Thursby* v. *Plant*) 240; Fitz. Nat. Brev. 145; Shep. Touch. 161; Comyns's Digest, *Covenant*, (B. 3.); *Brewster* v. *Kitchin*, 1 Lord Raym. 317, Salk. 198, Comb. 424, 466, 5 Mod. 360, 12 Mod. 166, Holt, 175, 669; *Holmes* v. *Buckley*, 1 Eq. Cas. Abr. 27; *Webb* v. *Russell*, 3 T. R. 393; *Milnes* v. *Branch*, 5 M. & S. 411. *Bally* v. *Wells*, 3 Wils. 25, Wilmot's Notes, 344, was a case of tithe.

Covenant not running with the land.

If an interest in the land passed by the grant, then the action is clearly misconceived; it should have been trespass, and not case—*Harker* v. *Birkbeck*, 3 Burr. 1556, 1 W. Blac. 482; or covenant—*Jones* v. *Hill*, 7 Taunt. 392; a plaintiff can never have an election to bring covenant or case—Comyns's Digest, *Action* (M). [*Tindal*, C. J.—In *Kinlyside* v. *Thornton*, 2 W. Blac. 1111, it was held that case in nature of waste will lie against a tenant for years after

Action misconceived.

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the expiration of his term, as well as covenant, f breach of covenants contained in his lease.] In *E Bembow*, 4 Taunt. 764, it was held that case for per waste does not lie against a tenant by lease, who l covenanted to repair.

2. Interest of both the grantees not vested in the plaintiff at the time of the expulsion complained of.

2. The entry by the defendants upon the workin place before the assignment to the plaintiff was com executed, viz. on the 8th July, for, though Stacey e the assignment in April, it was not executed by Setr the 27th July. The declaration, therefore, which sets assignment, and alleges that all the rights and inte Setree and Stacey came to the plaintiff before the e the defendants, was disproved by the evidence. I *pott* v. *Dobbinson*, 3 M. & P. 820, 6 Bing. 104, it w that, although a landlord may avow generally for arrear, under the statute 11 Geo. 2, c. 19, s. 22, yet th of the contract under which the tenant holds, m truly stated in the avowry: where, therefore, the def made cognizance as bailiff of J. S., whose tenant he the plaintiff to be, under a demise before then m the plaintiff at a certain yearly rent; and the p pleaded non tenuit modo et formâ: it was held th cognizance was not supported by proof of a conveya der which J. S. claimed, and which purported to hav made by three trustees, but was executed by two as J. S. thereby only took two-thirds of the pr as tenant in common with the trustee who had o to execute the deed. And in *Curtis* v. *Spitty*, 1 New 756, 1 Scott, 737, in debt for rent against an assign declaration stated that *all* the estate &c. of the lessee premises by assignment came to the defendant; t fendant in his plea took issue upon this averment; trial it appeared that the defendant was assignee of only of the premises: and it was held that this was variance. [*Tindal*, C. J.—In this form of action, plaintiff had a moiety it will suffice.]

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3. Notice sufficient.

3. The notice disclosed in the fourth plea was a sufficient notice to justify the re-entry by the defendants. The objections that will be urged on the part of the plaintiff to this notice, are, that it was conditional, and that it omitted to specify the breach in respect of which the right to re-enter was claimed. But the circumstance of the notice being conditional clearly did not invalidate it; the condition not being performed, the notice became absolute—*Rex* v. *Lidney*, Burr. Set. Cas. 1, 2 Str. 950; *Rex* v. *Herstmonceaux*, 7 B. & C. 551, 1 M. & R. 426. The object of the proviso was to prevent the grantor from entering without an interval. In *Doe* d. *Matthews* v. *Jackson*, 1 Doug. 175, a notice to quit, "or I shall insist upon double rent," was held sufficiently certain to support an ejectment: and Willes, J., said: "The notice is to be considered as having two parts—1. The common notice to quit—2. A warning to the tenant of the consequence, if he shall disobey the notice, and put the landlord to the necessity of bringing an ejectment." At the expiration of the month, the interest of the grantees would not be put an end to unless the grantor elected to avail himself of his right to re-enter—*Rede* v. *Farr*, 6 M. & S. 121; *Doe* d. *Bryan* v. *Bancks*, 4 B. & A. 401; *Roberts* v. *Davey*, 1 N. & M. 443, 4 B. & Ad. 664. Nor was it necessary that the notice should specify the breach in respect of which the grantor meant to re-enter. The performance of the covenants is in the knowledge of the lessee. It is enough if the notice conveys to the tenant an intimation of the landlord's intention to avail himself of the forfeiture: and in many cases this has been put as a question to the jury—*Doe* d. *Cox* v. *Roe*, 4 Esp. 185; *Doe* d. *Hinde* v. *Vince*, 2 Camp. 256; *Doe* d. *The Duke of Bedford* v. *Kightley*, 7 T. R. 63; *Doe* d. *Lord Huntingtower* v. *Culliford*, 4 D. & R. 248. The only use of the notice here was, to give the grantees time to remove their property after the grantor had made his election. There is no ambiguity in the notice: it gives the grantees an advantage,

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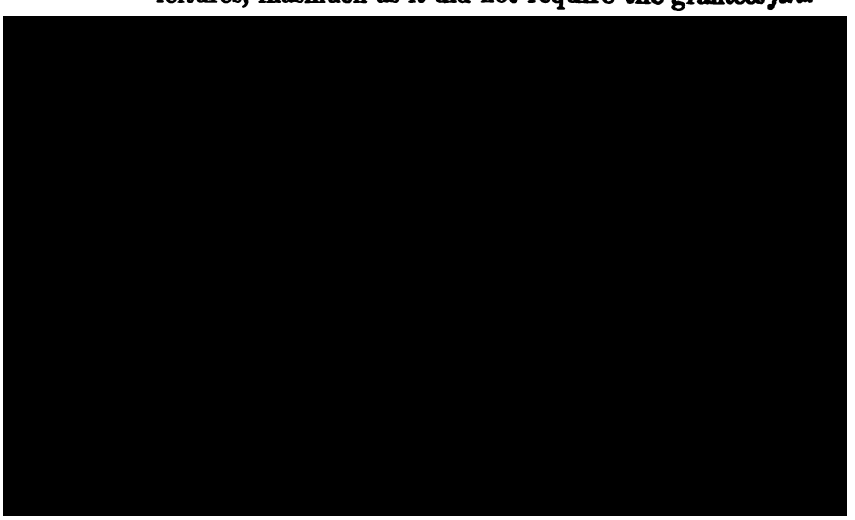
and exposes them to no difficulty. [*Coltman*, J.—The grantees could do nothing to cure the forfeiture; therefore no injury could possibly result to them from the absence of precise information as to the specific breaches.] Precisely so. At all events, after verdict, the defendants are entitled to have every intendment made in their favour. [*Tindal*, C. J.—The ground upon which an informal allegation is aided by verdict, is, that the fact, if put to the jury, must have been found one way, and therefore is to taken as if proved.] The cases as to defects cured by verdict or by pleading over, will be found collected in the notes to *Skinner* v. *Gunton*, 1 Wms. Saund. 228, and in 1 Chitty on Pleading, 6th edit., p. 678. In *Palgrave* v. *Windham*, 1 Str. 212, in an action on the case against a bailiff for executing a fi. fa. and removing the goods off the premises before the landlord was paid a year's rent, upon error brought it was objected that there was no allegation of notice that rent was due; but the court held, that, though notice was requisite, yet the want of alleging it was helped by the verdict. [*Bosanquet*, J.—The distinction is between a defective title and a title defectively set forth.] It will be contended on the part of the plaintiff that the notice given operated a waiver of former forfeitures, inasmuch as it did not require the grantees *forth-*



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ment from Setree and Stacey to the plaintiff was good; for, the assignment may be good though covenant may not be maintainable by the assignee. It is unnecessary to consider the cases of *Norway* v. *Rowe*, *Doe* d. *Hanley* v. *Wood*, and the other cases cited, to the effect that a mere licence is not assignable; for, this is a grant of an incorporeal hereditament, made to the parties and their assigns. [*Tindal*, C. J.—A licence given for profit, coupled with an interest, is clearly assignable.] In *Roberts* v. *Davey*, 1 N. & M. 443, 4 B. & Ad. 664, the interest in the licence passed to the executrix of the grantee. In Sheppard's Touchstone, Preston's edit., p. 96, it is said: "A mine may be a corporeal hereditament; for instance, if a mine be open, and granted, the grant is of a corporeal hereditament. In regard to mines not open at the date of the grant, this distinction (a distinction grounded on principle), though no decision is found on the point, may be taken. The grantee has an incorporeal, and not a corporeal hereditament—*Doe* d. *Hanley* v. *Wood*, 2 B. & A. 724; an interest which would pass by grant, without livery of seisin; and for such incorporeal hereditament, the grantee, his heirs or assigns, could not (unless he had possession of the land) maintain ejectment; for, it would be singular that that which is an incorporeal hereditament in the first instance should become a corporeal hereditament in the result. Besides, all the right of soil, subject to the easement or privilege of mining, remains to the grantor, his heirs and assigns. Thus, an ejectment will not lie for a piscary—*Molineux* v. *Molineux*, Cro. Jac. 146; nor quodam rivulo sive aquæ cursu —Yelv. 143; nor for pannage—*Pemble* v. *Sterne*, 1 Lev. 212. It has been decided that an ejectment will lie for a mine—*Commyn* v. *Kyncto*, Cro. Jac. 150; Noy, 120; *Andrews* v. *Whittingham*, Carth. 277. But whether the mine was claimed as resulting from a right or easement of mining, or from a right of soil, does not distinctly appear. It seems to have been for a mine held under a right of min-

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ing. Trespass also will lie against those who enter fully into possession of a mine held under a right ment of mining—*Harker* v. *Birkbeck*, Burr. 1556." v. *Wells*, 3 Wils. 25, Wilmot's Notes, 344, is a disti thority in favour of the plaintiff. *The Earl of Car Armitage*, 3 D. & R. 414, 2 B. & C. 197, is also an a to shew that these licences will pass by assignment the case that approaches the nearest to the present of *The Earl of Portmore* v. *Bunn*, 3 D. & R. 145, 1 694. It was not suggested there that the licence assignable; it was assumed that it was.

2. Interest of the plaintiff sufficient to entitle him to maintain the action.

2. The fact of the assignment having been exec Setree after the day on which the defendants ent wholly immaterial. This is not an action of contr of tort; and the plaintiff may recover damages in of the partial interest conveyed to him by Stacey. I *son* v. *Overend*, 6 T. R. 766, it was held, that if several part-owners of a chattel sue alone, the de can only take advantage of the objection by a plea in ment, even though the defect appear on the decl An action of covenant lies against the assignee of of an estate for a part of the rent—*Stevenson* v. *L* 2 East, 575. In *Ricketts* v. *Sawley*, 2 B. & A. 360, action for disturbance of the plaintiff's right of co the declaration stated that he was possessed of a m and land, with the appurtenances, and by reason ought to have common of pasture &c.; and it w that this allegation was divisible, and that proof t plaintiff was possessed of land only, and entitled right of common in respect of it, was sufficient to him to damages pro tanto. Besides, there was evid a continued interruption by the defendants after t cution of the deed by both. And the replication issue that which is a mere conclusion of law, w clearly improper—1 Wms. Saund. 23, n. [*Tindal*, That might have been an available objection on

demurrer; but it cannot be taken now.] As to the form of the action—There is no foundation for saying, that, if covenant might have been maintained here, case cannot. *Kinlyside* v. *Thornton*, 2 W. Blac. 1111, is a distinct authority to the contrary. In 2 Wms. Saund. 252 *b*, n., it is said that case is now "become the usual action as well for permissive as voluntary waste. And where the lessee even covenants not to do waste, the lessor has his election to bring either an action on the case, or of covenant, against the lessee for waste done by him during the time. As, where a lease was made for twenty-one years, in which the lessee covenanted to yield up the premises repaired at the end of the term; the lessee during the term committed waste, and at the expiration thereof delivered up the premises to the lessor in a ruinous condition. Afterwards the lessor brought an action on the case against the tenant for the waste committed by him during the term; and it being objected at the trial that the plaintiff ought to have brought an action of *covenant*, and not *on the case*, a verdict was found for the plaintiff subject to that point; but the court of Common Pleas was clearly of opinion that an action on the case was maintainable as well as covenant; and by De Grey, C. J.—'Tenant for years commits waste, and delivers up the place wasted to the landlord: had there been no deed of covenant, an action of waste, or case in the nature of waste, would have lain. Because the landlord by a special covenant acquires a new remedy, does he therefore lose his old?'" *Kinlyside* v. *Thornton*.

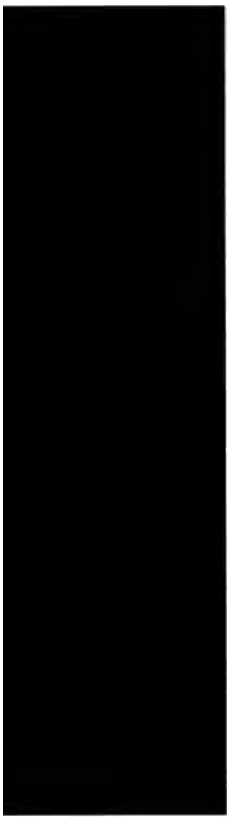
As to the form of the action.

3. The fourth plea discloses no answer to the action. The notice set forth is not such a notice as the deed requires: it is obnoxious to the two objections that have been anticipated, viz. that it is conditional, and that it omits to specify the breach in respect of which the grantors claimed a right to re-enter. To constitute a valid notice, it must be an intimation of a distinct and definitive intention to determine the lease: it must be a notice on which the

3. Notice not sufficient.

from that now under discussion, and that indenture was held not to amount to a demise of the mine, so as to entitle the grantee to maintain an ejectment; and it was in that case said by the court, to be "nothing more than a grant of *a licence to search and get* (irrevocable indeed, on account of its carrying an interest), with a grant of such of the ore as should be found or got, the grantor parting with no estate or interest in the mines, metals, and minerals."

Now, assuming this description of the instrument to be correctly applicable to the deed now under consideration, it is to be observed, that the deed in this case operates not merely as a licence but as a grant also. And this view is conformable to what is laid down in Vaughan, 351, in the case of *Thomas* v. *Sorrell*, where it is said "a dispensation or licence properly passes no interest, but only makes an action lawful which without it would have been unlawful; as, a licence to go beyond the seas, to hunt in a man's park, to come into his house, are only actions which without licence had been unlawful. But a licence to hunt in a man's park, and carry away the deer killed to his own use, to cut down a tree in a man's ground and to carry it away the next day after to his own use, are *licences* as to the acts of hunting and cutting down, but, as to the carrying away the deer killed and tree cut down, they are *grants*." And that such a grant to a man and his assigns carries an interest which is assignable, appears from *Palmer's* Case, 6 Rep. 25, reported also in Cro. Eliz. 819, under the name of *Basset* v. *Maynard*. In that case, Sir Thomas Palmer, being seised in fee of a wood, bargained and sold to one Cornforth and his assigns six hundred loads of wood to be taken by the assignment of Sir T. Palmer. Cornforth assigned his interest to the plaintiff: and the first resolution in the case was, that Cornforth had an interest which he might assign over, and not a thing in action or a possibility only. And the case of *Grantham* v. *Hawley*, Hob. 132, leads to a similar conclusion.



before us; and that the o
is, whether the interest w
And it is not unworthy of
and considered by the pa
express proviso in the origi
authorities shall be assign
modes of assignment.

Interest of the plaintiff sufficient to entitle him to maintain the action.

We come now to the se
fendants insisted that the
the third plea; as to whic
after the deed of assignme
but before it was executed
tered into the possession
workmen out; and eviden
general refusal to allow t
enter for the purpose of mi

The contention on behal
the time of the wrong comp
only had been assigned, an
ties; and, consequently, tha
disproved: and to make out
Spitty, 1 New Cases, 756,
being in point.

On the part of the pla

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provided that what is proved affords a ground for maintaining the action, supposing it to have been correctly stated as proved."

But it was further urged by him, that the action in this case was brought for preventing the plaintiff from using and enjoying the licences and authorities, not only by dispossessing and expelling the plaintiff and his workmen, but also by forcibly preventing and hindering him and his servants from having access to, or in any manner working the mines; that the allegation in the plea, that the rights and shares of Setree and Stacey did not nor did any of them become vested in the plaintiff, does not point to any particular time; and that it is sufficient to support the verdict on this plea for the plaintiff, if any substantial ground of action accrued after the assignment was executed by Setree and Stacey. And this latter view appears to us to be correct, and that the facts proved agree with the pleadings in the present case; and, there having been a subsequent general refusal to allow the plaintiff and his workmen to enter and search for ore, this issue seems to us to have been properly found for the plaintiff.

As to the form of the action.

Another point was incidentally suggested on behalf of the defendants, though not much insisted upon, that an action on the case under the circumstances was not maintainable, but that the action should have been an action of covenant or an action of trespass. It is not material to inquire whether in this case an action of covenant could be maintained; for, assuming that it might, it would not follow from thence that an action on the case might not also lie: on the contrary, it has been decided that a party may in some cases have his election, and bring either covenant or case—see *Kinlyside* v. *Thornton*, 2 W. Blac. 1111. And in the present case, the interest granted being assignable, the assignee has a right to enter on the land and to exercise his licence; and, if the owner of the soil prevents him, it is a wrong, for which an action on the case will lie, on

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the established principle of our law, that, in al where a man has a temporal loss or damage by the of another, he may have an action upon the case repaired in damages. Comyns's Digest, *Action* a *Case*, (A).

The ground on which it was maintained that t and not case, was the proper remedy, was this—th people at the mine, it is said, were forcibly expelle the possession of the mine, which is a trespass—*H Birkbeck*, 3 Burr. 1556. And the continued ref allow the re-entry of the parties entitled, is a con trespass, and not therefore the proper foundation action on the case.

The answer given to this objection appears to u sufficient, viz. that evidence was offered of a general to allow the plaintiff to enter upon any part of t comprised within the limits; that sometimes a m have an action upon the case, or of trespass, at h tion, for which Com. Dig. *Action*, (M. 2.), and *Gaince*, 1 Salk. 10, 1 Ld. Raym. 558, are authoritie that, even supposing the turning the miners out mine might, under the circumstances, have furnished for an action of trespass, the refusal generally t the plaintiff to exercise the liberties granted, which be in other parts than the mine itself previously would furnish sufficient ground for maintaining an on the case.

Notice insufficient,

The questions which arise on the other issues be cided in the plaintiff's favour, it remains to consid ther the fourth plea is sufficient in point of law, depends upon this, whether the notice set out in the plea was a sufficient notice so as to determine the i created by the first-mentioned indenture.

It is admitted in this case that a forfeiture ha incurred, and that the grantor was entitled to det the grant by giving a proper notice. If a notice ha

given to the effect that a breach of covenant had been actually committed, and that, in consequence thereof, the grantor had elected to determine the grant at the end of a month, no question could have arisen but that the interest of the grantee had been put an end to; he would have had a month's time to remove his machinery, and at the end of that time he must have quitted the premises. But the notice actually given contains no intimation of an election to determine the grant on account of the forfeiture which had been incurred; but only upon the happening of a certain contingency which might or might not take place; that is to say, if a further breach of covenant should be committed, he the grantor would enter after the expiration of a month from the affixing of the notice.

Now, it is obvious that the two notices directed by the proviso are in their nature essentially different. It is one thing to say—You have committed a breach, and therefore I will turn you out at the end of the month: it is quite another thing to say—If you shall at any time hereafter commit a forfeiture, I will turn you out at the expiration of a month after such forfeiture. Where an act has been done or omitted to be done by the grantee, whereby a forfeiture has been incurred, it is in the power of the grantor to waive the forfeiture or to take advantage of it; and the object of requiring a notice to be given, seems to be, that a month's time may be allowed to the grantee to remove his goods, after the grantor has definitively elected to vacate the grant at a fixed definite day. But the notice that has been given in this case binds the landlord to nothing: if a further breach of covenant is committed, he may waive it or not, at his election: the grantee does not know whether he is to quit or not, or at what time he is to quit. To hold this notice to be sufficient, would be in effect to deprive the plaintiff of the whole benefit of the clause in question. We think, therefore, that the notice was insufficient.

hire and reward, during all that time, used, exercised, and carried on, and still doth use, exercise, and carry on the business and occupation of such hoyman and carrier as aforesaid; and thereupon just before and at the time of the committing of the grievances thereinafter next mentioned, a servant of certain persons trading under the name, style, and firm of Messrs. F. Hart & Co., was directed and authorized by them to send divers, to wit, four hampers, containing respectively twenty dozens of wine, by a certain hoy or vessel of the plaintiff, to wit, from Kent Wharf aforesaid to Canterbury aforesaid, that is to say, to Mr. George Ash, of Canterbury aforesaid, and which said hampers had affixed to them respectively a certain address or direction, to wit, in the words following, that is to say, "George Ash, Esq., Canterbury. Per Hope's Hoy, Kent Wharf," and meaning the plaintiff's hoy, and which said hampers the plaintiff was then ready and willing to accept for the purpose aforesaid, and to carry the same in and by his said hoy or vessel from Kent Wharf aforesaid, to wit, to Whitstable, and so from Whitstable aforesaid to Canterbury aforesaid; and thereupon just before the committing of the said grievances, to wit, on the 18th August, 1838, the said servant took the said hampers to a certain wharf of and belonging to the defendant, called West's Wharf, not knowing, and for the purpose of inquiring, and he then inquired, whether or not Hope's Kent hoy or vessel, meaning, as the defendant then well knew, the hoy or vessel of the plaintiff, then went from the said last-mentioned wharf to Canterbury aforesaid; whereupon the defendant, then well knowing the premises, but falsely and fraudulently intending to injure the plaintiff, so being such hoyman and carrier as aforesaid, and to deprive him of the hire and reward he would otherwise have received and derived from the carriage of the said hampers in and by his said hoy or vessel, knowingly, falsely, fraudulently, deceitfully, and maliciously, then represented to the said

False representation.

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servant, that Hope's hoy, meaning the hoy or ves
the plaintiff, did then go from the said wharf of th
fendant called West's Wharf; whereas in truth a
fact the defendant well knew, as the fact then was,
the said hoy or vessel of the plaintiff did not then go
the said last-mentioned wharf: by means and in c
quence of which false representation of the defendant
said servant was then induced to deliver, and did the
liver the said hampers to the defendant, who, further
triving and intending as aforesaid, afterwards, to wi
the day and year aforesaid, sent the same, to wit, to
terbury aforesaid, by another and different hoy or
than the said hoy or vessel of the plaintiff, and th
hampers were never delivered to the plaintiff or c
or conveyed by his said hoy or vessel to Whitstab
Canterbury aforesaid, or elsewhere: by means and in
sequence of which said several premises the plaintif
lost and was deprived of the hire and reward, profit,
fit, and advantage, which might and would otherwise
been paid and arisen and accrued to him from the fi
and carriage of such hampers in and by his said h
vessel as aforesaid, and he the plaintiff was and is
wise injured and damnified.

Second count.

The second count stated that the plaintiff, befor
at the time of the committing of the grievances b
defendant thereinafter mentioned, was, and from t
hitherto had been and still is such hoyman and carr
aforesaid, and thereupon just before and at the ti
the committing of the greivances thereinafter menti
a servant of a certain person, to wit, Mr. James W
of St. Andrew's Wharf, Blackfriars, was directed
authorized by the said James Weston to send dive
wit, two casks containing cement by a certain h
vessel of the plaintiff, to wit, from Kent Wharf afor
to Canterbury aforesaid, that is to say, to Mr. G
Cooper, of Canterbury aforesaid, and which said cask

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affixed to them respectively a certain address or direction, to wit, in the words following, that is to say, "George Cooper, Canterbury, per Hope's Hoy, Kent Wharf," meaning the plaintiff's hoy: which said casks the plaintiff was then ready and willing to accept for the purpose aforesaid, and to carry and convey the same in and by his said hoy or vessel from Kent Wharf aforesaid, to wit, to the said George Cooper at Canterbury aforesaid; and thereupon, just before the committing of the said grievances hereinafter mentioned, to wit, on the 22nd September, 1838, the said last-mentioned servant took the said casks to a certain wharf of and belonging to the defendant, called West's Wharf, not knowing whether or not Hope's hoy (meaning the hoy or vessel of the plaintiff) then went from the said last-mentioned wharf to Canterbury aforesaid; whereupon the defendant, then well knowing the premises, but contriving and falsely and fraudulently intending to injure the plaintiff, so being such hoyman and carrier as aforesaid, and to deprive him of the hire and reward he would otherwise have received and derived from the carriage of the said casks in and by his said hoy or vessel, knowingly, falsely, fraudulently, deceitfully, and maliciously then deceived the said last-mentioned servant, and induced him to believe that Hope's hoy (meaning the said hoy or vessel of the plaintiff) did then go from the said wharf of the defendant called West's Wharf; whereas in truth and in fact the defendant well knew, as the fact was, that the said hoy or vessel of the plaintiff did not then go from the said last-mentioned wharf: By means and in consequence of which said deceit and inducement of the defendant, the said last-mentioned servant was then induced to deliver and did then deliver the said casks to the defendant, who, further contriving and intending as aforesaid, afterwards, to wit, on the day and year last aforesaid, sent the same, to wit, to Canterbury aforesaid, by another and different hoy or vessel than the said hoy or

Deceit.

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vessel of the plaintiff, and the said casks were neve vered to the plaintiff or carried or conveyed by h hoy or vessel to Canterbury aforesaid or elsewhere.

Third and subsequent counts.

The declaration contained other four counts, in th form as the second count—the third relating to a t goods addressed, "W. Knight, Whitstable. Hope's H the fourth, to a basket of hardware addressed, "N. J 23, Sun Street, Canterbury. Per Hope's Hoy"—th a package addressed, "D. Nathan, Canterbury. Per Hoy"—and the sixth, a package addressed, "Mr. N Upholsterer, Canterbury. Per Hope's Hoy, Kent W

Pleas.

The defendant pleaded—first, not guilty, to the declaration—secondly, to the first count, that the sa vant therein mentioned was not by means or in quence of the said alleged representation of the defe in that count mentioned, induced to deliver, nor did means or in consequence thereof deliver, the said ha therein mentioned to the defendant, in manner and fo the plaintiff had above alleged—concluding to the try. There was a similar plea to each of the counts.

On each of these pleas issue was joined.

The cause was tried before Coltman, J., at the sitti London after the last term. The facts that appea evidence were as follow:—The plaintiff was the prop of certain hoys sailing periodically from a wharf Simmonds's Kent Wharf, in Montague Close, South to Whitstable in Kent.

Simmonds's evidence.

Simmonds, who was called as a witness on the p the plaintiff, stated, that, in the year 1838, he let tion of this wharf to the defendant, removing his bu to the other part of the wharf, whence the plai hoys continued to sail. At the time of the letting defendant was informed by Simmonds that he did n him the name of "Kent Wharf," intending to retain his own wharf.

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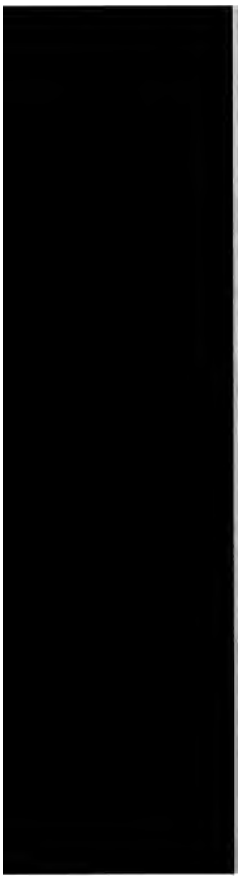
This evidence as to the conversation between Simmonds and the defendant about the name of the wharf, was objected to on the part of the defendant, it appearing that the letting was *by lease*, which therefore was alone admissible to shew the terms thereof. The learned judge, however, admitted it, not as evidence to vary or explain the terms of the lease, but to shew that the defendant was aware of Simmonds's intention to remove the name of the wharf to his own adjoining premises.

It further appeared, that, for some time after he had taken the wharf, the defendant called it "West's Kent Wharf," and had latterly changed it to "West's Wharf."

The evidence offered in support of the second, third, fourth, and fifth counts (the first not being proved, and the sixth being abandoned), was as follows:—As to the second—One Winterflood, a carman, stated that he, on the day named in the count, took two casks of cement (directed to George Cooper, Canterbury,) to the defendant's wharf, and told a man on the wharf that he had two firkins of cement for Kent Wharf, to go per Hope's hoy, to which the man to whom he addressed himself replied—"It's all as one: turn round, and we'll strike them;" that he accordingly left the two casks, obtaining a receipt for them at the counting-house. As to the third count—One Chambers, a porter, stated that he took the goods mentioned in that count to the defendant's wharf, telling a man there that he had a package for Hope's Whitstable hoy, to which the answer was, "It goes from here: all right:" and that he thereupon left it, and got a receipt at the counting-house. As to the fourth count—One Harding stated that he took the goods to the defendant's wharf, telling a person on the wharf that he wanted Kent Wharf, Hope's hoy, and that the answer was, "It is called West's Wharf now," and he left the goods. As to the fifth count—One Day stated that he went to the defendant's wharf, and said that he had a sofa for Canterbury, for



" the wharfinger did not en
ticular vessel named in the

On the part of the defen
memorandum negatived th
purpose of conveyance by
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must be taken to have a
by any proper hoy.

His lordship, however ru
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whatever, and he excluded
jury: and he left it to the j
had been the false represe
whether made by a person
defendant, telling them tha
port the first count.

The jury returned a verd
counts—damages 5*l.*

As to the direction of the judge.

Wilde, Serjeant, on a for
a rule nisi for a new trial
and that the verdict was in
declaration; and also in ar
sation between Simmonds
name of the wharf, was in
the contract between them

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or by whose acts the defendant could be bound; the alleged misrepresentations in each case being made by labourers upon the wharf. It is no part of a wharfinger's duty to have persons *on the wharf* to answer inquiries: the counting-house is the proper place, and the only place where any thing said or done can or ought to bind him (176). As to the arrest of judgment—It is not alleged (in the second, third, fourth, and fifth counts) that the direction was affixed on the packages at the time of delivery to the defendant; nor is it averred that the goods were left at the wharf with any express intimation or direction that they should be conveyed by Hope's hoy—the omission of which averment is in effect an entire omission of the cause of action; nor is there any statement in either count of anything said or done by the defendant, or by any one authorized by him, amounting to a fraud or false pretence. In *The King* v. *Perrott*, 2 M. & S. 379, it was held that an indictment on the 30 Geo. 2, c. 24, for obtaining money by false pretences, must negative by special averment the truth of the pretences; it is not enough to charge that the defendant *falsely pretended* &c. (setting forth the pretences), by means of which *said false pretences* he obtained the money &c. Besides, the declaration contains no averment of loss of freight in consequence of the alleged false representations. [*Tindal*, C. J.—That objection cannot avail after verdict: the jury have found that the damage necessarily flowed from the acts charged.]

As to the arrest of judgment.

Cur. adv. vult.

TINDAL, C. J., now delivered the opinion of the court:—

The motion for a rule nisi in this case was made on three distinct grounds—first, for a new trial, on the ground of misdirection on the part of the learned judge—secondly, for a new trial, on the ground of the verdict being taken

(176) See Garth v. Howard, 1 M. & Scott, 628.

But we think the rule sh
other grounds of objection.

As to the alleged misdirection.

The ground of misdirect
was admitted of a convers
and the defendant, in whic
ant he did not let the nam
wharf, and that he should t
on his own wharf; and tha
sible, because there was a le
ties, and that no parol e
qualify or explain it, and th
duced, to shew whether it
But it appears to us that the
to shew knowledge on the p
monds had intended to call
" Kent Wharf," and not for
ing or varying the terms of
this purpose, and to this ex
perly admitted.

It was further objected,
that the judge told the jury
nothing to do with the case.
that he told the jury, that,

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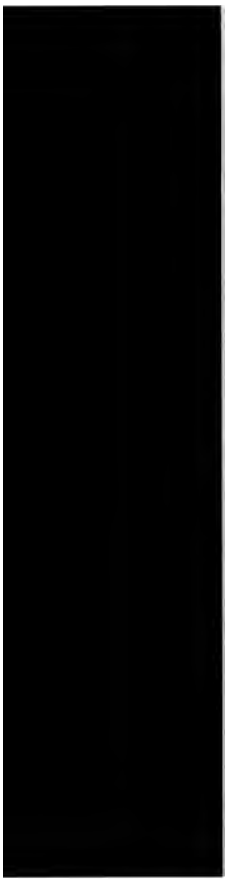
ation—we cannot think they would be found sufficient to arrest the judgment: but, as the rule will be granted to shew cause on one ground, it will rest with the discretion of the plaintiff to proceed without amendment, or to ask leave to amend.

Rule nisi accordingly (177).

(177) The parties subsequently settled the matter, and consequently the rule dropped.

END OF TRINITY TERM.



21 Jac. 1, c. 12	Double cos
c. 16	Limitation
29 Car. 2, c. 3, s. 4	Statute of f
s. 17	Statute of f
1 W. & M. c. 26, s. 2. 12 Anne, st. 2, c. 14, s. 1	Quare Imp
2 Geo. 2, c. 23, s. 23	Costs of ta
11 Geo. 2, c. 19	Use and oc
19 Geo. 3, c. 70	Removal of
25 Geo. 3, c. 77	Building ac
37 Geo. 3, c. 90, s. 31	Admission
41 Geo. 3, c. lxi	Great Abi
43 Geo. 3, c. 46, s. 2	Deposit in
55 Geo. 3, c. 184	Stamps—"
	"
59 Geo. 3, c. 12, s. 24	Poor. 477.
6 Geo. 4, c. 16, ss. 50, 52, 56	Bankrupt.
7 Geo. 4, c. 46	Banking co
c. 57	Insolvent d
7 & 8 Geo. 4, c. 71, s. 1	Deposit in
9 Geo. 4, c. 14	Limitation
c. 22	Costs of ele
c. 61	Public-hou
1 & 2 Will. 4, c. 58	Interpleade
2 Will. 4, c. 39	Practice. 2
2 & 3 Will. 4, c. 64	Description
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c. cx	General Ce
3 & 4 Will. 4, c. 42, s. 23	Amendmer
s. 26	Competenc
s. 34	Costs in Q
c. 74, s. 7	Fine, amen
s. 85	Acknowled

INDEX.

ABANDONMENT.

See CONTRACT, 2.

ACCOUNT.

1. A plea to an action of account by a merchant against his partner, charging him as tenant in common and bailiff, that, before the commencement of the action, and after the selling and disposing of the goods and merchandizes in the declaration mentioned, the defendant did render to the plaintiff a reasonable account of the said goods and merchandizes, and of the proceeds and profits thereof, is in substance a plea of plenè computavit. Baxter v. Hozier, 233.

2. To satisfy such a plea the defendant must prove an account rendered shewing *an agreed balance* between the plaintiff and defendant: an account in which the defendant charges himself as factor for the whole, instead of charging himself as factor for one moiety and as owner of the other, thereby making himself liable to a moiety of the losses arising from the sale of the whole, is insufficient. Ib.

ACKNOWLEDGMENT.

Under the 3 & 4 Will. 4, c. 74.

1. Under the statute 3 & 4 Will. 4, c. 74, s. 91, the court may dispense with the concurrence of the husband to the conveyance by a feme covert of *copyhold* property to which she is entitled for her sole and separate use—that clause overriding the 77th. In re Shirley, 174.

2. A commission for taking the acknowledgment of a married woman under the statute 3 & 4 Will. 4, c. 74, was addressed to "*Judge* M'Roberts and W. Pythian," Illinois, in the United States, and was returned certified by "W. Pythian and *Samuel* M'Roberts:"—The court required an affidavit shewing the identity of Judge M'Roberts and Samuel M'Roberts. Ex parte Mann, 142.

3. And *semble*, that an affidavit verifying the certificate of acknowledgment is properly sworn before a notary public at that place. Ib.

ACTION ON THE CASE.

See PLEADING, II.

ACTIONEM NON.

The formal commencement of 'actionem non' is necessary in a plea to part of the cause of action, whether pleaded in *bar* or only to the *further maintenance* of the particular part to which it is pleaded. Upward v. Knight, 311.

ADVOWSON.

Right of Presentation where one of two Co-Patrons a Roman Catholic.

1. The right of presentation given to the Universities by the statutes 3 Jac. 1, c. 5, ss. 18, 19, 20, 1 W. & M. c. 26, s. 2, and 12 Anne, st. 2, c. 14, s. 1, arises only in the case of a *sole* patron or *all* of several co-patrons professing the Roman Catholic religion. Where two are jointly seised of an advowson, the one being a Roman Catholic, the other a protestant, the sole right of presentation is in the latter. Edwards v. The Bishop of Exeter, 652.

2. Tenants in common of an advowson, one being a protestant, the other a Roman Catholic, the church being vacant, the former presented alone; the ordinary re-

the meaning of the proviso in the last-mentioned statute. Ib.

AFFIDAVIT.

Intituling.

Where a rule is obtained upon an affidavit erroneously intituled, the court will not discharge it, but will permit the affidavit to be amended and re-sworn. Cooper v. Talbot, 345.

AGENT.

Recognition of Authority.

A distress warrant was addressed to the plaintiffs or their agent. The plaintiffs' clerk struck out the plaintiffs' name and inserted that of one W. The distress having been made by W., the defendant had notice of that fact, and had several communications with W. as to the disposing of the goods:—Held, that the employment of W. was sufficiently authorized by the defendant, and that the alteration did not render the warrant void. Toplis v. Grane, 620.

Quære, whether a broker who enters under an ordinary warrant of distress, and takes goods upon the premises that are privileged by law from distress, can look for indemnity from his employer?—Semble not. Ib.

And see STATUTE OF FRAUDS, II.

AGREEMENT.

See AMENDMENT, III, 2—CONTRACT—VENDOR AND PURCHASER

fused to allow them, and held that it *was* a case for amendment at the trial, upon nominal costs. Sanderson v. Piper, 418.

And see AFFIDAVIT.

AMOVEAS MANUS.

This court has no power to order the sheriff to restore money levied under a capias utlagatum, on the reversal of the outlawry: the application should be for an amoveas manus in the court of Exchequer. Croft v. Lord Percival, 847.

ANNUITY.

The grantor of an annuity, notwithstanding his discharge under the insolvent debtors act, is liable to his surety for payments made on account of the annuity subsequently to the discharge, though due before. Abbott v. Bruere, 753.

APPROPRIATION.

See PAYMENT.

ARBITRATION.

I. *Enlargement of Time for making Award.*

By a bond of submission it was provided that the arbitrators should make their award on or before the *20th August*, 1838, or the umpire his on or before the *20th September;* each having power to enlarge the time. On the 14th August the arbitrators enlarged the time for making their award to the 2nd October, and again on the 28th September to the 1st November; and in October they communicated to the umpire that there was no probability of their agreeing. The umpire on the 17th September enlarged the time for making his award to the 1st December, and on the 26th November further enlarged the time to the 20th December, before which day he made his award. The submission recited, amongst other things, that B. was *proprietor of a certain share or shares or other right or interest in or to certain hatches*. By his award the umpire directed that these hatches should be removed *by and at the expense of B.*—so as the award with regard to *one* of them should only concern or relate to such part, share, right, interest, or control which B., his heirs, &c., then had or might thereafter have therein, and not further or otherwise:—Held, on motion for an attachment against B. for non-performance of the award—First, that the enlargement by the umpire was properly made on the 17th September; Secondly, that it was not necessary that B. should have had notice in writing of such enlargement—but it was enough that he had a verbal intimation of the fact before the attachment was moved for; Thirdly, that the authority of the umpire was properly called into existence; Fourthly, that it was duly exercised. In re Dodington and Bailward, 733.

II. *Sufficiency of Award.*

1. The plaintiff declared upon a special contract, made by one P. S. as agent for the defendant, for the sale of a large quantity of fir sleepers, assigning for breaches—first, that certain sleepers were delivered to and received by the defendant, but not paid for—secondly, that a certain other quantity were shipped on board a vessel called the Hope, and conveyed to London for the defendant, but that he refused to accept them—thirdly, that the defendant declined to accept the residue. There was also a count for goods sold and delivered. The defendant pleaded—first, as to all but 39*l.* 7*s.* 11*d.* in the last count, non assumpsit; paying that sum into court, which the plaintiff accepted in satisfaction of his demand upon that count—secondly, to the special count, that P. S. was not his agent—thirdly, to the same count, that the plaintiff did not deliver, nor did he accept, the sleepers that were the subject of the first breach—fourthly, that plaintiff did not offer to deliver the residue. The cause was referred, the costs to abide the event of the award. The arbitrator found, that, at the time of the commencement of the action, the defendant *was liable to pay* the plaintiff 75*l.*, which sum he directed him to pay, minus the sum paid into court; and he further found that the sleepers shipped on board the Hope were the property of the plaintiff and at his disposal:—Held, that this was a sufficient finding upon both counts to entitle the plaintiff to the costs of all the issues. Rennie v. Mills, 276.

2. To an action for use and occupation commenced on the 27th June, the defend-

to arbitration. The arbitrator some months after made his award, directing a verdict to be entered for the plaintiff in the first action for 15*l.* 15*s.*, and negativing the alleged set-off; he also found that there was no cause for the second action; and, as to the matters in difference, he awarded that the plaintiff should pay to the defendant 129*l.* 6*s.* 9*d.*:—Held, that the arbitrator had properly adjudicated upon the subject-matter of the alleged set-off, as a matter in difference between the parties. Petch v. Fountain, 441.

And see In re Dodington and Bailward, ante, I. 1.

III. *Setting aside Award.*

An arbitrator, after the making of his award, with a view to enable one of the parties to take the opinion of the court upon his decision, stated to him the ground upon which he had proceeded, shewing that he had put an erroneous construction upon the order of reference:—The court set aside the award, though unexceptionable on the face of it. Jones v. Corry, 106.

ARREST.

1. The defendant was arrested by one S. who at the time had no warrant from the sheriff; in order to give a false colour of legality to the caption, S. procured one N., who had a warrant against the defendant at the suit of another plaintiff, to hand over that warrant to him, and the undersheriff altered the warrant by substituting the name of S. for that of N. as the officer by whom it was to be executed:—Held, that the defendant was not in the lawful custody of S., and that, the sheriff having,

ATTORNEY.

I. *Admission.*

One W. was admitted an attorney of the court of King's Bench in 1810, and took out his first certificate in 1813, which he regularly renewed till 1819, when he ceased to practise. In 1823, he was re-admitted in the King's Bench; but he did not take out a certificate until 1826, when he was for the first time admitted an attorney of the Common Pleas:—This court refused to order his name to be struck off the roll, although the court of King's Bench had held that he was no attorney of that court at the time of his admission here—it not appearing that he had been guilty of any fraud or concealment on the occasion of his being admitted of this court, and the application against him being made after so great a lapse of time. Paget v. Chambers, 610.

II. *Re-admission.*

1. An attorney *re-admitted* in one of the courts at Westminster, is entitled, under the 7 Will. 4 & 1 Vict., c. 56, s. 4, to practise in the other courts, without re-admission therein. Ex parte Thompson, 343.

2. The court will under *very* special circumstances relax the rules required to be observed on the re-admission of attornies. Ex parte Smith, 344.

III. *Liability for Refreshments supplied to Witnesses.*

The mere circumstance of a party being the attorney in the cause will not make him responsible for refreshments supplied by a coffee-house keeper to the witnesses while attending the trial. But the fact of his being found in communication with the witnesses at the coffee-house, is *some* evidence to go to the jury, that the supplies were sanctioned by him. Fendall v. Nokes, 647.

IV. *Lien for Costs.*

See SET-OFF.

BAIL.

Payment into Court in Lieu of—see COSTS, I.

BAILIFF.

See ACCOUNT

BANKERS.

See JOINT STOCK BANKS.

BANKRUPT.

I. *Rights and Liabilities of Assignees.*

1. The pension payable to a military officer on his retirement from the service of the East India Company, does not, upon his bankruptcy, pass to his assignees; such pension not being granted *by deed*, and consequently not recoverable by an action at law. Gibson v. The East India Company, 74.

2. In an action by assignees of a bankrupt against the defendant for not delivering railway shares pursuant to a contract made with the bankrupt—the plaintiffs having in their declaration averred that the bankrupt before his bankruptcy, and the plaintiffs as assignees since, were always ready and willing to accept and to pay for the shares—the defendant took issue upon this averment:—Held, that the plea was sustained by proof that before the time fixed for the performance of the contract, the bankrupt was in a state of total incapacity to pay the price agreed on, and that his effects produced no assets to the assignees. Lawrence v. Knowles, 381.

3. A contract for the sale by the defendant to the bankrupt of railway shares was to be performed on the 1st July, 1835. To a declaration by the assignees for a breach of this contract in not delivering the shares, the defendant pleaded that the assignees did not adopt the contract within a reasonable time after the bankruptcy, and averred that the contract was abandoned by mutual consent:—Held, that the circumstance of the assignees having suffered a considerable period to elapse without requiring the contract to be performed, was evidence whence the jury might infer an abandonment. Ib.

4. In such a case the assignees ought to make their election within a reasonable time; and *semble*, that, what is or is not a reasonable time, is a question for the jury. Ib.

II. *Debt, Mutual Credit, or Set-off.*

A., B., & C., traders in partnership, were indebted to one H. H. in 51,891. 12*s*. Upon a dissolution of the partner-

H. H. a balance of 47,000*l.*:—Held, that C.'s liability to H. H. did not constitute a debt or mutual credit which could be set off under the 6 Geo. 4, c. 16, s. 50, in an action by the assignees of A. & B. against him for the recovery of the 6,817*l.* 9*s.* 8*d.* due from him to the firm; nor a debt proveable under the 52nd or 56th sections. Abbott v. Hicks, 715.

III. *Plea of Bankruptcy and Certificate.*

Bankruptcy of a sole plaintiff after the cause of action accrued and before the commencement of the suit, is an issuable plea. Willis v. Allen, 474.

BARON AND FEME.

I. *Authority of Wife to contract.*

In an action for a school bill, it appeared that the defendant's wife took the child (her niece) to the plaintiff's school, and that the defendant had visited her while there; but there was no evidence of any communication between the plaintiff and the parent of child:—Held, that the fact of the defendant having paid for articles for domestic use ordered by his wife, was evidence for the jury of her authority to charge him with the education of the child. M'George v. Egan, 112.

II. *Deed of Separation.*

The execution of a deed of separation between a husband and his wife, which had been previously drawn up, is a legal consideration for a promise by a third party (a trustee) to pay money for which

with costs to be taxed &c., on the days therein specified—by instalments:—Held, that the plaintiff was not bound to tax the costs before signing judgment, on a default. Barrett v. Partington, 595.

COLONIAL COURT.
See FOREIGN JUDGMENT.

COMMISSION.
The court refused to disallow a commission for examining the plaintiff's witnesses abroad, though there had been great delay on his part; but they referred it to the Master to say whether or not the security the plaintiff had given for costs should not be increased. De Rossi v. Polhill, 836.

CONDITION.
See MINES.

CONSCIENCE, COURT OF.
See COURT OF REQUESTS.

CONTEMPT.
See ATTACHMENT.

CONTINGENT REMAINDER.
A common recovery suffered by a bare tenant for life, though unaccompanied by any feoffment or fine, operates a bar of the contingent remainders depending upon the particular estate, notwithstanding the statute 14 Eliz. c. 8. Doe d. Davis v. Gatacre, 807.

CONTRACT.
1. In an action by assignees of a bankrupt against the defendant for not delivering railway shares pursuant to a contract made with the bankrupt—the plaintiffs having in their declaration averred that the bankrupt before his bankruptcy, and the plaintiffs as his assignees since, were always ready and willing to accept and to pay for the shares—the defendant took issue upon this averment:—Held, that the plea was sustained by proof that before the time fixed for the performance of the contract, the bankrupt was in a state of total incapacity to pay the price agreed on, and that his effects produced no assets to the assignees. Lawrence v. Knowles, 381.

2. A contract for the sale by the defendant to the bankrupt of railway shares was to be performed on the 1st July, 1835. To a declaration by the assignees for a breach of this contract in not delivering the shares, the defendant pleaded, that the assignees did not adopt the contract within a reasonable time after the bankruptcy, and averred that the contract was abandoned by mutual consent:—Held, that, the circumstance of the assignees having suffered a considerable period to elapse without requiring the contract to be performed, was evidence whence the jury might infer an abandonment. Ib.

3. In such a case the assignees ought to make their election within a reasonable time; and *semble*, that what is or is not a reasonable time, is a question for the jury. Ib.

4. A contract for the sale of goods was, in the presence and at the desire of the buyer, written and signed by the seller's traveller in a book belonging to the former, as follows:—"Of North and Co., 30 Mats Maur^{s}. Cash two months. Joseph Dyson:"—Held, that this was not a sufficient note or memorandum of the bargain to satisfy the 17th section of the statute of frauds—Dyson not appearing to be authorized to sign it *as agent for the buyer*. Graham v. Musson, 769.

5. The authority of an agent to sign such a contract need not be in writing. Ib.

Contracts prohibited by Law.

6. A court of law will not lend its aid to enforce the performance of a contract between parties, which appears, upon the face of the record, to have been entered into by both the contracting parties for the express purpose of carrying into effect that which is prohibited by the law of the land. Gas Light Co. v. Turner, 779.

7. In covenant for non-payment of rent, the defendant pleaded that the indenture was made between the plaintiffs and himself, and the premises demised by them to him, *for the express purpose* of being used for and applied by the defendant to a use prohibited under a penalty by the building act, 25 Geo. 3, c. 77:—Held, that the plea was a good answer to the action. Ib.

CONVERSION.
See TROVER.

COPYHOLD.

Acknowledgment of, under 3 & 4 Will. 4, c. 74.

Under the statute 3 & 4 Will. 4, c. 74, s. 91, the court may dispense with the concurrence of the husband to the conveyance by a feme covert of *copyhold* property to which she is entitled for her sole and separate use—that clause overriding the 77th. In re Shirley, 174.

COSTS.

I. *Of Motions and Rules.*

The defendant deposited with the sheriff 200*l.*, the amount of the debt, and 10*l.* for costs, in lieu of a bail-bond, under the statute 43 Geo. 3, c. 46, s. 2. The additional 10*l.* not having been paid into court under the 7 & 8 Geo. 4, c. 71, s. 1, in lieu of special bail, the plaintiff obtained a rule for taking the money out, but did not enter an appearance for the defendant. The defendant afterwards obtained a rule nisi that the money so taken out of court by the defendant, and the additional 10*l.*, might be considered in lieu of special bail. This rule was discharged. Both these rules were silent as to costs. Another rule was obtained by the defendant calling on the plaintiff to shew cause why, *on payment of costs*, the bill on which the action had been brought should not be delivered up to him. This rule was made absolute:—Held, that the plaintiff was entitled to the costs of the last-mentioned rule; but not to those of the two former—those rules being silent as to costs, and not being rules made in the course and progress of the suit, which was determined by the act of the plaintiff in taking the money out of court and declining to enter an appearance for the defendant. Hannah v. Willis, 357.

II. *Of Issues*—See ARBITRATION, II.

III. *Of Special Argument.*

The defendants claimed the costs of the argument of a special case (the question in which was, whether or not parol evidence was admissible to shew that a bill of exchange by which the drawers required the drawees to pay "two hundred pounds, value received," was not intended to be drawn for that sum, but for 245*l.*, which last-mentioned sum appeared in figures at the top of the bill, and was covered by the stamp), on the groun the declaration was not so framed entitle the plaintiffs to recover as u bill for 200*l.*, and that this was not for amendment under the 3 & Will. 42, s. 23. But the court refused to them, and held that it *was* a cas amendment at the trial upon no costs. Sanderson v. Piper, 418.

IV. *Costs of Attachment.*

Costs of an attachment include all as are fairly incidental to the attachi and among others those of proceedin clear the defendant of his contempt. v. Campbell, 116.

V. *Under the Interpleader Act*, 1 Will. 4, c. 58.

A stakeholder who bonâ fide com the court under the interpleader a entitled to his costs out of the fund o produce of the subject-matter in dis to be repaid by the party ultimatel successful. Reeves v. Barraud, 281

VI. *Under the Blackheath Court of quests Act.*

By the Blackheath court of req act, 6 & 7 Will. 4, c. cxx, the com sioners are impowered to entertain ceedings against parties resident &c. w their jurisdiction, where the debt o mand shall not exceed 5*l.*: and b 1 & 2 Vict., c. lxxxix, s. 2, it is pro that nothing in the former act shal tend to prevent or restrain any pers persons from suing in any of the sup courts where the sum *sought to b covered* shall amount to 40*s.*:—Held, the sum the jury shall award, shal deemed to be the sum *sought to be covered.* Collins v. Cross, 113.

VII. *Double Costs under 7 Jac. 1,*

1. In trespass against two magistr with a plea of not guilty, it appear the trial that the action was bro against the defendants for issuing a tress-warrant for non-payment of a p rate, under which the plaintiff's g were seized. The defendants obtain verdict; but, the judge not having gr ed a certificate (though applied to), there being nothing upon the face of record to shew that the defendants sued as magistrates, the Master decl to tax them their double costs under 7 Jac. 1, c. 5:—Held that the court

no power, by suggestion or otherwise, to enable the defendants to obtain double costs. Penney v. Slade, 484.

2. But, *semble*, that, in case of a *non-suit*, a suggestion might be made upon the roll for that purpose. Ib.

VIII. *Certificates.*

(1). *Under the* 43 *Eliz. c.* 6, *s.* 2.

1. *Quære*, whether the judge, having granted a certificate under the 43 Eliz. c. 6, s. 2, to deprive the plaintiff of costs in an action of trespass, has power to revoke it? Whalley v. Williamson, 135.

2. If so, such power must be exercised within a reasonable time—at all events before the expiration of the time for signing final judgment. Ib.

(2). *Under the* 5 *&* 6 *Will.* 4, *c.* 39. *See* QUARE IMPEDIT, II.

IX. *Taxation of Costs.*

1. The Master having on taxation disallowed half the costs of preparing briefs, on the ground that the plaintiff's attorney had prepared them with unnecessary haste —The court declined to interfere. Bucknall v. Boydell, 171.

2. In an action to recover a large sum, a verdict having been found for the defendant, and a new trial directed on payment of costs, the Master, on taxing the defendant's costs, disallowed the briefs and fees to the junior counsel and the consultation fees (on the ground that the briefs disclosed no witnesses for the defence), and also the journies and attendance of the defendant's attorney (from Bath):—The court directed the Master to review his taxation. Maddison v. Bacon, 201.

3. The defendant gave a cognovit for 100*l.*, with a stipulation that judgment should not be entered up till default should be made in payment of the debt, 72*l.* 2*s.*, with costs to be taxed &c., on the days therein specified—by instalments:—Held, that the plaintiff was not bound to tax the costs before signing judgment, on a default Barrett v. Partington, 595.

X. *Costs of Taxation.*

Where the sum taxed off an attorney's bill is less than a sixth, this court will, in the exercise of the discretion given to them by the statute 2 Geo. 2, c. 23, s. 23, order the client or the attorney to pay the costs of taxation according as they shall find the bill reasonable or unreasonable. Russell v. Yorke, 130.

XI. *Of Election Petition.* *See* PARLIAMENT.

XII. *In Quare Impedit.* *See* QUARE IMPEDIT, II.

XIII. *Setting off Costs.*

1. In trespass against two defendants, the plaintiff obtained a verdict against one, and the other was acquitted. The court made absolute *without costs* a rule for setting off the costs of the successful defendant against the damages and costs awarded for the plaintiff against the other defendant—disregarding the attorney's lien. Rawlings v. Sewell, 230.

2. On receiving the debt and costs, the plaintiff's attorney refused to allow certain interlocutory costs due to the defendant to be set off. Without making any formal demand of these costs, the defendant obtained a rule calling upon the plaintiff or his attorney to pay them:—The court made the rule absolute *without costs*. Abernethy v. Paton, 122.

XIV. *Security for Costs.*

1. In an action by a pauper to try the right to property claimed by him, the court refused to stay the proceedings until security for costs was given by a third party who had actively countenanced them, it not appearing that the action would not have been brought but for the assistance and instigation of such third party. Osborne v. Pechell, Hearsay v. Pechell, 477.

2. The court refused to disallow a commission for examining the plaintiff's witnesses abroad, though there had been great delay on his part; but they referred it to the Master to say whether or not the security the plaintiff had given for costs should not be increased. De Rossi v. Polhill, 836.

COUNSEL'S SIGNATURE. *See* PRACTICE, VII. 3.

COUNTY COURT. *See* FALSE JUDGMENT.

COURT OF REQUESTS.

6 *&* 7 *Will.* 4, *c. cxx, and* 1 *&* 2 *Vict. c. lxxix—Blackheath.*

By the Blackheath court of requests act, 6 & 7 Will. 4, c. cxx, the commissioners are impowered to entertain pro-

COVENANT.

1. The word "demise" in a lease implies a covenant for title as well as a covenant for quiet enjoyment; but both are restrained and qualified by a subsequent *express covenant for quiet enjoyment.* Line v. Stephenson, 69.

2. In covenant against an assignee of a term, for rent accruing whilst she was assignee, issue was taken upon the fact of the defendant being assignee. A witness for the plaintiff proved that he had received on account of the plaintiff rent from one W., who had occupied the premises about the time when the rent in question accrued; the plaintiff then called W., who proved that he was tenant to the defendant under an agreement which did not amount to an *assignment*:—Held, that W. was not an incompetent witness, on the ground of interest:—Held also, that the objection to his competency should have been taken on the voire dire, inasmuch as his position was shewn to be equivocal by the statement of the first witness. Hartshorne v. Watson, 494.

3. A. agreed, in consideration and *on payment of* 200*l.* at stipulated times, to assign to B. the lease of certain premises, for the residue of a term of which A. was assignee, at the yearly rent of 100*l.*, and under and subject to the covenants, provisos, and agreements in the original lease; and B. agreed to accept the said lease *on payment of* the 200*l.* and interest, and in the meantime and until such

follows:—"I give and devise to my right and lawful heir-at-law (for the better finding out of whom I direct advertisements to be published immediately after my decease in some of the public papers,) all my manors, lands, &c., in B., to hold the aforesaid manors, &c., to my heir-at-law, his heir, executors, administrators, or assigns, for ever, subject to and chargeable with the payment of all my just debts, funeral charges, bonds, annuities, and all legacies hereinafter mentioned [various legacies to relations on his mother's and grandmother's side]: all which debts, legacies, &c., I do hereby order and direct to be paid by the said heir-at-law, his heir, executors, or assigns, within twelve months after my decease: but, should it so happen that no heir-at-law is found, I then do hereby constitute and appoint W. Lowndes, of &c., my lawful heir, on condition he change his name to Selby: and I give the estates, and all the manors before-mentioned, together with all the rights &c. before mentioned, to the aforesaid W. Lowndes, subject to and chargeable with all the legacies, debts, &c., before mentioned:"—Held, that the "right and lawful heir-at-law" did not necessarily mean an heir of the blood of the Selbys; but that the intention of the testator would be satisfied by any heir-at-law who should be found capable of inheriting the whole of his property, whether purchased by himself, his father, or his grandfather. Davies, Dem. Lowndes, Ten., 21.

2. Testator devised lands to M. S., together with the use of all his household goods &c., for life; remainder to the use of J. D. S. for life, with remainder to the use of the heirs of the body of M. S. in tail; remainder to the use of testator's nephew, A. H., for life, with remainder to the use of the heirs of his body in tail; remainder to the use of testator's niece, E. H., for life, with remainder to the use of the heirs of her body in tail; remainder to his cousin A. A., for life, with remainder to the use of the heirs of his body in tail: and he declared "that all the aforesaid limitations of his estate were intended by him to be *in strict settlement*, with remainder to his own right heirs for ever:"—Held, that M. S. took an immediate estate for life, and an estate in remainder in tail general expectant on the determination of the estate for life limited to J. D. S. Douglas v. Congreve, 284.

3. Testator devised an estate to A. H. for life, remainder to R. H. for life, and to his first and other sons successively in tail male, with remainder, in default of such issue, to A. D. H. for life, with remainder to his first and other sons successively in tail male; and, in default of such issue, she gave and devised the same premises "unto such person bearing the surname of H., as *shall be* the male relation nearest in blood to the said R. H., and to his heirs for ever:"—Held, that the ultimate remainder in fee vested in interest *at the death of the testatrix*. Stert v. Platel, 422.

DISTRESS.

For Rent.

1. The defendant, an attorney, employed the plaintiffs to levy a distress for rent upon the premises of an auctioneer, urging them to make the levy *forthwith*, assigning as a reason that *there was a large quantity of furniture in the auction-room*, and by the warrant he directed them to distrain "the *several* goods and chattels on the premises." Acting upon these instructions, the plaintiffs caused all the goods upon the premises to be seized. Some of the goods so seized turning out to be protected from distress, the owners brought actions, and eventually the goods were restored to them, and the plaintiffs incurred costs:—Held, that, under the circumstances, an indemnification of the plaintiffs against the consequences of pursuing the defendant's instructions, was implied by law. Toplis v. Grane, 620.

2. Held, also, that the plaintiffs' conduct in the premises did not exhibit such a degree of negligence and want of skill as to afford an answer to an action for their work and labour. Ib.

3. The warrant was originally addressed to the plaintiffs or their agent. The plaintiff's clerk struck out the plaintiffs' name and inserted that of one W. The distress having been made by W., the defendant had notice of that fact, and had several communications with W. as to the disposing of the goods:—Held, that the employment of W. was sufficiently authorized by the defendant, and that the alteration did not render the warrant void. Ib.

that he so returned into custody *before the defendant had notice of the escape.* Davies v. Chapman, 458.

ESTATE FOR LIFE.
See DEVISE, 2.

ESTOPPEL.

1. A foreign judgment cannot be set up as an estoppel, unless it appear upon the record that it is conclusive and binding between the parties in the place where it is pronounced. Smith v. Nicolls, 147.

2. Where a verdict passes against a defendant upon a plea of set-off, he is estopped from setting up the same demand in a fresh action. Eastmure v. Laws, 461.

EVIDENCE.

I. *Competency of Witness.*

In covenant against an assignee of a a term, for rent accruing whilst she was assignee, issue was taken upon the fact of the defendant being assignee. A witness for the plaintiff proved that he had received on account of the plaintiff rent from one W., who had occupied the premises about the time when the rent in question accrued; the plaintiff then called W., who proved that he was tenant to the defendant under an agreement which did not amount to an *assignment*:—Held, that W. was not an incompetent witness, on the ground of interest:—Held, also, that the objection to his competency should have been taken on the voire dire, inasmuch as his position was shewn to be equivocal by the statement of the first witness. Hartshorne v. Watson, 494.

II. *Interest of Witness.*

By an inclosure act it was enacted that all ways over a certain field called West Field allotted to B., should be extinguished from the time of the making and completion of a new road as therein directed; with a proviso that nothing in the act should extend or be construed to extend to deprive A., his heirs or assigns, or his or their agents &c., of the right of ingress, egress, and regress, to and from a watercourse, for the purpose of re-building, repairing, opening, or shutting the sluices thereon, or to cleanse the same:—Held, that a tenant of A. who occupied meadowland irrigated by means of the sluices, was a competent witness in an action by A. for an obstruction of this right of way. Adeane v. Mortlock, 189.

III. *What admissible.*

1. On the trial of a writ of right, decrees in Chancery in causes between the tenant's father and other persons not connected with the demandant, and to which proceedings the latter was neither party nor privy, were admitted for the purpose of shewing the character in which the tenant's father assumed and retained possession of the premises. Davies, dem., Lowndes, ten., 21.

2. Receipts for rent (produced from the proper custody) given by the tenant's father in his own name after the date of the fine:—Held, admissible to shew an exercise of ownership by him. Ib.

3. A Welsh pedigree was produced on the part of the demandant to prove the relationship to each other of certain of the parties through whom she claimed, and containing at the foot of it the following certificate—"collected from parish registers, wills, monumental inscriptions, family records, and history: this account is now presented as correct, and as confirming the tradition handed down from one generation to another, to Thomas Lloyd, of Cwm Gloyne, this 4th July, 1733, by his loving kinsman, and sincere friend and very devoted servant, William Lloyd:"—Held, inadmissible, though the custody whence it came was not objectionable, and the parties whose relationship it was sought to establish by it were known to the compiler. Ib.

4. The defendant became surety for the due payment by one H. N., of monies he might receive on account of the plaintiff. H. N. made default; and an account of his deficiencies having been prepared, and a copy sent to the defendant, with an intimation that the items had been gone over by H. N., and the balance assented to by him, the defendant promised to pay the amount. In an action upon the guarantee, the defendant refusing to produce the account sent to him, a clerk of the plaintiff's was called to identify the account assented to by H. N. with that sent to the defendant:—Held, that his evidence was properly received—Coltman, J., dissentiente. Ward v. Suffield, 352.

5. The mere circumstance of a party

being the attorney in the cause will not make him responsible for refreshments supplied by a coffee-house keeper to the witnesses while attending the trial. But the fact of his being found in communication with the witnesses at the coffee-house, is *some* evidence to go to the jury, that the supplies were sanctioned by him. Fendall v. Nokes, 647.

6. The plaintiff by his declaration demanded 100*l.* for work and labour, 100*l.* for money paid, and 100*l.* for money due upon an account stated, and in his particular claimed 96*l.* 17*s.* 11*d.* as the balance of the account: the defendants pleaded, that, after the 100*l.* in the declaration mentioned became due from them, and after the accruing of the causes of action in respect thereof, they paid 100*l.* to the plaintiff, and he received the same, in full satisfaction and discharge: the plaintiff traversed the plea; and at the trial it appeared that the defendants had paid 100*l.* on account, and that a balance of 96*l.* 17*s.* 11*d.* remained due:—Held, that the plea was not proved; and that it was not necessary for the plaintiff to new assign. James v. Lingham, 603.

IV. *Under Not Guilty, in Case,*

A declaration in case charged the defendant with negligently driving a horse and cart along a highway, whereby the plaintiff's horse was mortally injured. Under a plea of not guilty:—Held, that it was not competent to the defendant to give in evidence at the trial, that the cart was not his, and that he was not driving it at the time of the accident. Taverner v. Little, 796.

And see COMMISSION—CONTRACT, 2.

EXPRESS COVENANT.

See COVENANT, 1.

EACTOR.

See ACCOUNT.

FALSE JUDGMENT.

To a writ of false judgment upon a judgment pronounced in the county court of Yorkshire, the sheriff returned that the defendant "had not given him security to prosecute his suit," &c.:—The court quashed the return. Longden v. Croots, 377.

The 6th section of the statute 1 3, c. 70, applies only to causes r from the inferior court *before* ju Ib.

And, *semble*, that its operation fined to causes removed from courts *of record*. Ib.

FALSE REPRESENTATIO

A contract for the sale of fixtu fittings of a public-house—Held, avoided by a false representation vendor as to the amount of busi tached to the house, though the agr expressly excluded *goodwill*. Hut v. Morley, 341.

FIERI FACIAS.

Forms of Writs.

1. On a judgment in the c Queen's Bench in an action of ass 13.

2. On an order of the court of Bench for payment of money, 14.

3. On an order of the court of Bench for payment of money an 15.

4. On a judgment of an inferi in an action of assumpsit, remov the court of Queen's Bench, 16.

5. On an order for payment of made in an inferior court, and r into the court of Queen's Bench, 1

6. On an order for payment of and costs made in an inferior cou removed into the court of Queen's 18.

FINE.

1. *Validity of Fine.*

T. J. Selby, by his will dev follows:—"I give and devise to m and lawful heir-at-law (for the finding out of whom I direct ad ments to be published immediate my decease in some of the public p all my manors, lands, &c., in B., the aforesaid manors, &c., to my l law, his heir, executors, administra assigns, for ever, subject to, and able with the payment of all n debts, funeral charges, bonds, an and all legacies hereinafter me [various legacies to relations on ther's and grandmother's side]: all debts, legacies, &c., I do hereby ord direct to be paid by the said heir-

his heir, executors, or assigns, within twelve months after my decease: but, should it so happen that no heir-at-law is found, I then do hereby constitute and appoint W. Lowndes, of &c., my lawful heir, on condition he change his name to Selby: and I give the estates, and all the manors before mentioned, together with all rights, &c. before mentioned, to the aforesaid W. Lowndes, subject to and chargeable with all the legacies, debts, &c. before-mentioned." Twelve years after the testator's death, Lowndes, who down to that period had acted as receiver of the estate, under the appointment of the court of Chancery, his receivership being put an end to by a decree, took possession of the property, and from thence to the time of his death retained possession claiming the freehold and exercising dominion over it as his own. In April, 1784, he executed two deeds in the name of William Selby, and the manor courts held by him after that date were held in that name:—Held, that a fine levied by him in the name of William Selby in Trinity Term, 1784, was valid and effectual as a bar against all the world; and that it was admissible in evidence though not pleaded specially.—Davies, dem., Lowndes, ten., 21.

II. *Amendment.*

The court permitted a fine to be amended by introducing the name of an adjacent parish, the deed to lead the uses containing the words "or any other adjoining parish," the land appearing to have been intended to pass, and possession having gone accordingly. Totton, dem., Vincent, def., 835.

FLAX.

See PATENT.

FOREIGN JUDGMENT.

1. A plea of a judgment recovered in the Vice Admiralty Court at Sierra Leone is no bar to an action brought for the same cause in this country. Smith v. Nicolls, 147.

2. A judgment of a colonial court against a party absent from the place, and not represented by any agent upon whom the process of the court could be served, is prima facie void. Ib.

3. A foreign judgment cannot be set up as an estoppel, unless it appear upon the record that it is conclusive and binding between the parties in the place where it is pronounced. Ib.

FRAUD.

See FALSE REPRESENTATION.

FRAUDS, STATUTE OF.

See STATUTE OF FRAUDS.

FREIGHT.

Insurance on.

The owner of a vessel effected a policy on freight, "at and from Calcutta, or any port or place on the Coromandel coast, to any port or place at Bourbon." The vessel put in at Coringa, a port on the Coromandel coast, for the purpose of repair. The repairs were completed, and a full cargo purchased for the owner and deposited in warehouses at a place distant about seven miles from Coringa, ready to be put on board. Whilst in the act of being got out of the dock in which the repairs were done, the vessel received such injury as to make her a total wreck, and render abandonment necessary:—Held, that the interest of the assured in the subject matter of insurance was properly described in the policy as *freight*; and that the interest of the assured had commenced and the policy had attached at the time the loss took place. Devaux v. I'Anson, 507.

GUARANTIE.

The defendant became surety for the due payment by one H. N. of monies he might receive on account of the plaintiff. H. N. made default; and an account of his deficiencies having been prepared, and a copy sent to the defendant with an intimation that the items had been gone over by H. N., and the balance assented to by him, the defendant promised to pay the amount. In an action upon the guarantee, the defendant refusing to produce the account sent to him, a clerk of the plaintiff's was called to identify the account assented to by H. N. with that sent to the defendant:—Held, that his evidence was properly received—Coltman, J. dissentiente. Ward v. Suffield, 352.

INTERPLEADER.

Costs of Motion.

A stakeholder who bonâ fide comes to the court under the interpleader act, is entitled to his costs out of the fund or the produce of the subject matter in dispute, to be repaid by the party ultimately unsuccessful. Reeves v. Barraud, 281.

ISSUABLE PLEAS.

See PLEADING, VI.

JOINDER IN DEMURRER.

Demand of

The rule of Hilary Term, 4 Will. 4, dispenses with the *rule* to join in demurrer, but not with the demand of a joinder. Billing v. Kightley, 844.

JOINT STOCK BANKS.

The court made a rule absolute for filing the account (and certificate and affidavit verifying the same) filed at the stamp-office pursuant to the statute 7 Geo. 4, c. 46, s. 6, and for entering a suggestion on the roll of the persons who appeared from the affidavit to be members of the co-partnership therein mentioned. Williams v. Aspinall, 822.

JOINT STOCK COMPANY.

See PLEADING, III. 1.

LACHES.

See PRACTICE, I. 8.

LANDLORD & TENANT.

Contract of Tenancy, how determined.

The defendants were tenants from year to year to the plaintiff of the upper floors of a warehouse, at a rent payable quarterly; the premises were destroyed by an accidental fire in the middle of a quarter, and were wholly untenantable until rebuilt about seven months after:—Held, that the relation of landlord and tenant between the parties was not determined by the destruction of the premises, but that the defendants remained liable for rent until the tenancy should be in the usual manner put an end to; and that such rent was recoverable in assumpsit for use and occupation. Izon v. Gorton, 537.

And see DISTRESS.

LEASE.

Deposit of.

See USURY.

LEAVE AND LICENCE.

The defendant having distrained the goods of the plaintiff for arrears of rent, the latter signed the following undertaking:—"In consideration of Mr. C. giving me the household furniture distrained for rent due to him (but the furniture only), I undertake to give him possession of the premises held by my late husband, on or before one week from this date." At the expiration of the week (the plaintiff having in the meantime acted upon the agreement by removing part of the furniture, and selling other part), the defendant and others entered and took possession. In an action of trespass for such entry:—Held, that the above memorandum sustained a plea of leave and licence: and *semble*, that the licence was not revocable; or that, if it were so, no evidence of revocation could be given without being replied.—Feltham v. Cartwright, 695.

LETTERS PATENT.

See PATENT.

LICENCE.

Sale of.

1. One R., possessed of a licensed house, mortgaged the premises, together with the licence. After the licence had been suspended for irregular conduct on the part of R., the mortgagee sold the premises, under a power of sale contained in the deed. The defendant, the assignee of R., who had in the meantime become bankrupt, obtained a new licence in the name of the purchaser, for which the latter paid him 150*l.*:—Held, that this was not money had and received to the use of the plaintiffs. Manifold v. Morris, 404.

2. *Quære*, whether public-house licences can properly be the subject of separate sale? Ib.

And see MINES.

LIMITATION OF ACTIONS.

1. Mutual debts, there being no written accounts between the parties, are not within the exception in the statute of limitations. Mills v. Fowkes, 444.

2. Where a creditor has two several

demands against his debtor, one barred by the statute of limitations, the other not, a part payment, to take the case out of the operation of the statute, must be expressly made on account of the older debt. Ib.

3. But, in the absence of any express appropriation by the debtor at the time of making it, the creditor is at liberty to appropriate the payment towards satisfaction of that portion of the debt which the statute would bar. Ib.

LIQUIDATED DAMAGES.
See PENALTY.

LOAN.
See USURY.

MACHINERY.
See PATENT.

MEMORANDA.
I. *Judges.*
Death of Mr. Justice Park, 73.
Appointment of Mr. Justice Erskine, 73.
Resignation of Bolland, B., 340.
Appointment of Maule, B., 340.

II. *Queen's Counsel.*
John Stuart, Esq., Robert Vaughan Richards, Esq., Samuel Girdlestone, Esq., Griffith Richards, Esq., 340.

III. *Patent of Precedence.*
William Goodenough Hayter, Esq., 340.

MILITARY PENSIONS.
See EAST INDIA PENSIONS.

MINES.
A licence to mine and search for minerals and to carry away the same and to convert them to the grantee's use, conveys to the grantee an interest that is capable of being assigned. Muskett v. Hill, 855.

2. A mining licence contained a covenant on the part of the grantees constantly and bonâ fide to mine and search for all lodes, veins, and strata of metallic minerals within the limits described, and effectually to work according to the laws of good mining; with a proviso, t there should be any failure or bre the grantees or their assigns in t formance of any of the covenants (a others, a failure, after notice so to keep six able miners constantly en in driving the adits or sinking the level), and notice in writing abo fixed within the limits that the g intended to avoid the licences granted because of such failure or then, after the expiration of one from the affixing such notice, often as the same should happe withstanding the waiver of any pa feiture, it should be lawful for th tors to re-enter, &c.; and that aft re-entry the licences should be sively determined and avoided. grantees having failed to mine ing to their covenant, the grantor 6th April, 1836, affixed on the notice, that, unless the grant thenceforth keep six able mine stantly employed in driving the a sinking the deepest level, and other respects work all lodes, ve strata of metallic minerals with limits, according to the true int meaning of the covenant above s &c., the grantors *would*, in pursu the above proviso, after the expir one month from the affixing of notice, re-enter into the premis avoid and determine all the licen authorities granted and demised indenture, and would eject and e persons claiming under the auth the said indenture:—Held, that not a sufficient notice to determ interest created by the indenture.

3. And held that an action on was maintainable against the gran expelling the assignee and his wo and forcibly preventing them from access to or working the mine. I

4. The third plea stated that th shares, and interests of the gran not, nor did any of them, become in the plaintiff. The evidence w the assignment to the plaintiff w cuted by one of the grantees *bef* by the other *after* the re-entry grantors:—Held, that, there havi a subsequent general refusal to al plaintiff and his workmen to en search for ore, the plaintiff was en recover upon this issue. Ib.

MONEY HAD AND RECEIVED.
See LICENCE, 1.

MORTGAGE.
See LICENCE, 1.

MUTUAL CREDIT.
See BANKRUPT, II.

MUTUAL DEBTS.
Mutual debts, there being no written accounts between the parties, are not within the exception in the statute of limitations. Mills v. Fowkes, 444.
And see BANKRUPT, II.

NECESSARIES.
See INFANT.

NEW ASSIGNMENT.
Where necessary.
The plaintiff by his declaration demanded 100*l.* for work and labour, 100*l.* for money paid, and 100*l.* for money due upon an account stated, and in his particular claimed 96*l.* 17*s.* 11*d.* as the balance of the account: the defendants pleaded, that, after the 100*l.* in the declaration mentioned became due from them, and after the accruing of the causes of action in respect thereof, they paid 100*l.* to the plaintiff, and he received the same, in full satisfaction and discharge: the plaintiff traversed the plea; and at the trial it appeared that the defendants had paid 100*l.* on account, and that a balance of 96*l.* 17*s.* 11*d.* remained due:—Held, that the plea was not proved; and that it was not necessary for the plaintiff to new assign. James v. Lingham, 603.

NEW TRIAL.
Damages under 20l.
The court refused to grant a new trial in an action of slander, the jury having given the plaintiff 20*s.* damages only, though the judge who tried the cause was dissatisfied with the verdict. Rendall v. Hayward, 407.

NONSUIT.
Judgment as in case of a Nonsuit.
See PRACTICE, VIII.

OUTLAWRY.
See PRACTICE, I.
Reversal of Outlawry.
1. Upon reversing an outlawry on the ground that the defendant was abroad at the time the proceedings were had against him, the court will not require him to give bail. Porter v. O'Meara, 837; Gill v. Tynte, 840.
2. But it should distinctly be shewn by affidavit (properly, of the defendant himself,) that the defendant was out of the kingdom at the time of the issuing of the exigent. Ib.
3. The 3 & 4 Will. 4, c. 42, s. 41, which impowers arbitrators or umpires to swear witnesses, does not exclude the power of the court or a judge to administer the oath. James v. Attwood, 841.
4. To induce the court to permit a party to rescind his submission, under s. 39, strong grounds must be laid before them. Ib.
5. This court has no power to order the sheriff to restore money levied under a capias utlagatum, on the reversal of the outlawry: the application should be for an amoveas manus in the court of Exchequer. Croft v. Lord Percival, 847.

OVERSEERS.
Appointment of.
Seven magistrates of Poole assembled in petty session for the purpose of appointing two overseers. One of them (the mayor) producing a list containing the names of four who had been recommended as fit persons by the vestry, proposed that the first two should be appointed. One of the other magistrates objected that both were of one political party, and proposed two from a list of twelve, which he produced. Whilst this gentleman and three others of the magistrates were conferring upon the subject, the mayor drew from his pocket two blank forms with seals attached, and after filling them up with the names of the two he had proposed, and signing them, procured them to be signed by the two magistrates nearest to him, and handed them to the high constable, who was in attendance. After this was done, the magistrate who had proposed the other two, requested that the votes might be taken; when the mayor said it was too late, as he had already

made the appointment. The votes were however taken by the clerk. Six voted for the two persons last proposed; the other three declined to vote. The overseers thus appointed by the mayor and his two friends made a rate. The plaintiff refusing to pay the rate, a distress warrant was issued against him by the mayor and one of the other magistrates who signed the appointment. In trespass against the magistrates granting the warrant, for the seizure of the plaintiff's goods under it, the jury negativing fraud in the appointment of the overseers:—Held, that the action was not maintainable; the appointment of the overseers being a judicial act, performed without fraud at a meeting competent in point of jurisdiction to perform it, and the act being verified by a sufficient number of signatures to satisfy the statute regulating the mode of appointment. Penney v. Slade, 285.

PARLIAMENT.

Costs of Election Petition.

1. The clauses of the statute 9 Geo. 4, c. 22, which regulate the mode of ascertaining the amount of the costs of proceedings before an election committee, are to be favourably construed; and every fair intendment is to be made in support of the jurisdiction under which the Speaker acts. Fector v. Beacon, 203.

2. It is no objection to a certificate in favour of the sitting member, that the costs of an elector admitted before the committee as a party to defend the return, are included in the amount of the taxation; the certificate of the Speaker being by s. 60 declared to be conclusive evidence of *the amount* of the costs. Ib.

3. The party entitled to costs under the Speaker's certificate may demand such costs of and bring his action against any one of several parties by the certificate declared liable to pay the same. Ib.

PARTNERS.

See Account—Bankrupt, II—Joint Stock Banks.

PATENT.

A patent was taken out for "new and improved machinery for preparing and spinning flax, hemp, and other fibrous substances, by power;" and by the specification the invention was declared sist of "*new machinery for ma* flax and other similar fibrous sul previous to drawing and spinning also of *improved machinery for the same* after having been so pre The only alleged improvement spinning machinery was declare "placing the drawing rollers only ches and a half from the retaining which was nearer than they had e fore been placed for the purpose ning flax. It appeared, howev spinning machines were always structed, as, by means of slides, the distance of the rollers to be according to the staple or fibre article to be spun; and that cott always been spun with a reach than two inches and a half:—He this was not the proper subject of a though the jury found that the in was both new and useful; and, quently, that the specification, bei as to part, was void altogether. Marshall, 548.

PAYMENT.

Appropriation of Payments

1. Where a creditor has two sev mands against his debtor, one ba the statute of limitations, the othe part payment, to take the case out operation of the statute, must be ex made on account of the older debt. v. Fowkes, 444.

2. But, in the absence of any appropriation by the debtor at the making it, the creditor is at liberty propriate the payment towards s tion of that portion of the debt wh statute would bar. Ib.

And see Pleading, V.

PEDIGREE.

A Welsh pedigree was produced part of the demandant in a writ of to prove the relationship to each o certain of the parties through wh claimed, and containing at the foo the following certificate—"collecte parish registers, wills, monumen scriptions, family records, and A this account is now presented as c and as confirming the tradition l down from one generation to anot Thomas Lloyd, of Cwm Gloyne, t

July, 1733, by his loving kinsman, and sincere friend and very devoted servant, William Lloyd:"—Held, inadmissible, though the custody whence it came was not objectionable, and the parties whose relationship it was sought to establish by it were known to the compiler. Davies, dem., Lowndes, ten., 21.

PENALTY.

By an agreement the defendant covenanted that he and other parties would within a given time demise certain premises to the plaintiff, the indenture to contain certain covenants; and the plaintiff covenanted to accept the lease, and execute a counterpart thereof, and bear and pay the expenses of making the lease and counterpart and agreement; *and, for the true performance of the agreement, each of the parties bound himself unto the other in the penalty of* 500*l. to be recovered against the defaulter as liquidated damages*:—Held, that this was a *penalty*, and not *liquidated damages*. Boys v. Ancell, 364.

And see CONTRACT, 6, 7.

PENSION.

See EAST INDIA PENSIONS.

PLEADING.

I. ASSUMPSIT.

Pleas in.

1. A plea to an action by a second indorsee against the maker of a bill of exchange, that the defendant did not indorse the bill to the first indorsee (naming him), is a sufficient pursuance of an order permitting him to plead that he did not indorse the bill modo et formâ. Waters v. The Earl of Thanet, 181.

2. The formal commencement of 'actionem non' is necessary in a plea to part of the cause of action, whether pleaded in *bar* or only to the *further maintenance* of the particular part to which it is pleaded. Upward v. Knight, 311.

3. To a declaration in which the plaintiff claimed 50*l.* for goods sold and delivered, 50*l.* for money had and received, and 50*l.* on an account stated, the defendant pleaded payment of 50*l.*, not averring it to have been paid in satisfaction of the causes of action. The plea professing to be an answer to the whole declaration, the plaintiff joined issue on the allegation of payment of the 50*l.*, and signed judgment for the damages ultra:—The court set aside the judgment, but without costs. Wood v. Farr, 270.

II. CASE.

What may be given in Evidence under Not Guilty.

A declaration in case charged the defendant with negligently driving a horse and cart along a highway, whereby the plaintiff's horse was mortally injured. Under a plea of not guilty:—Held, that it was not competent to the defendant to give in evidence at the trial that the cart was not his, and that he was not driving it at the time of the accident. Taverner v. Little, 796.

III. DEBT.

Declarations in.

1. By an act of parliament incorporating a joint-stock company it was provided that the money to be raised by the company by virtue of the act should be laid out and applied in the first place in paying and discharging all costs and expenses incurred in applying for and obtaining and passing the act, and all other expenses preparatory or relating thereto. In an action for work and labour and money expended in and about the applying for, obtaining, and passing the act, and in and about divers other matters and things preparatory and relating thereto:—Held, that the plaintiff (a member of the company) might sue the company without alleging that the work was done or the money expended at their request; and that *debt* was the proper form of action. Carden v. The General Cemetery Company, 97.

2. Held, also, that an averment in the declaration, that the company, after the passing of the act, "under and by virtue of the act, did receive divers sums of money, out of which *they might* and ought to *have paid and satisfied the plaintiff*," was sufficient upon *general* demurrer. Ib.

3. In an action against the marshal for an escape, a plea that the prisoner, before the commencement of the action, voluntarily returned into custody, should aver that he so returned into custody *before the*

same day, but returnable ten days later:—The court ordered it to be set aside. Ib.

II. *Pleading several Matters.*

In trespass for a false imprisonment of the plaintiff on a charge of having committed a certain offence, to wit, a felony—The court allowed the defendant to plead—1. that the plaintiff had forged the acceptance to a certain bill of exchange—2. that he had issued the bill, knowing the acceptance to be forged—3. that the defendant had reasonable cause to believe that the plaintiff had forged the acceptance—4. that the plaintiff had obtained money on the bill by false pretences. Currie v. Almond, 172.

III. *Pleading Puis darrein Continuance.*

The court permitted one of two defendants to plead his bankruptcy and certificate, without the affidavit required by the rule of Hilary Term, 4 Will. 4, that the matter thereof arose within eight days before the pleading of such plea; it appearing that the defendants had had reason to believe that the action would not be proceeded with: and this, though it did not appear whether or not the demand was provable under the fiat. Kibblewhite v. Reynolds, 232.

IV. *Indorsement of Time for pleading.*

It is not necessary where a declaration is *filed*, to indorse on it the time for pleading. Silverside v. Tappen, 481.

V. *Rule to join in Demurrer.*

The rule of Hilary Term, 4 Will. 4, dispenses with the *rule* to join in demurrer, but not with the demand of a joinder. Billing v. Kightley, 844.

VI. *Rule to compute.*

Service of a rule to compute where the defendant is abroad and has no place of residence in this country, and no attorney acting for him in the suit. Gibson v. Lord Ranelagh, 231.

VII. *Setting aside Proceedings.*

1. To a declaration in which the plaintiff claimed 50*l.* for goods sold and delivered, 50*l.* for money had and received, and 50*l.* on an account stated, the defendant pleaded payment of 50*l.*, not averring it to have been paid in satisfaction of the causes of action. The plea professing to be an answer to the whole declaration, the plaintiff joined issue on the allegation of payment of the 50*l.*, and signed judgment for the damages ultra:—The court set aside the judgment, but without costs. Wood v. Farr, 270.

2. To an action by an indorsee against the maker of a promissory note, the defendant pleaded, that, after the making of the note, the plaintiff drew a bill on the defendant for a certain sum, which, after the defendant had accepted it, the plaintiff took in satisfaction of the promissory note, and indorsed it to persons unknown to the defendant: the plaintiff replied that he did not draw such bill, nor did the defendant accept it, nor did he, the plaintiff, take it in satisfaction of the promissory note: the defendant demurred to this replication for multifariousness. A judge at chambers having, upon an affidavit that the plea was false, made an order for setting aside the demurrer as frivolous—the court rescinded the order. Edwards v. Greenwood, 482.

3. The declaration being demurred to for a substantial defect, the plaintiff obtained an order to amend on payment of costs. On attending the taxation, it was discovered that the demurrer was not signed by counsel, whereupon the plaintiff signed judgment for want of a plea:—The court set aside the judgment on payment of costs—the plaintiff having leave to amend on payment of costs. Pocock v. Shell, 229.

VIII. *Judgment as in Case of.*

1. *In Town Causes*

Judgment as in case of a nonsuit cannot be moved for by one of several defendants, where the others are not in a condition to join in the motion. Fowler v. Duke, 344.

2. *In Country Causes.*

The rule is settled, that, in a country cause, where issue is joined in a *non-issuable* term, the defendant may move for judgment as in case of a nonsuit, for not proceeding to trial, in the term after the next Assizes: but that, where issue is joined in an *issuable* term, he cannot move until *two* Assizes have elapsed. Williams v. Davis, 178.

IX. *Postponing Trial.*

The court cannot, without the consent

and was possessed of the bill, and that the defendant, believing that R. was lawfully possessed of the bill, and had authority to negotiate and dispose of it, received it from him as security for a pre-existing debt. The plaintiff replied, that, at the time of the defendant's so taking and receiving the bill from R., the defendant had notice and well knew that R. had not good or sufficient right or authority to lodge and deposit the bill with the defendant:—Held, that the issue was well taken. Hilton v. Swan, 398.

V. *Duplicity and Uncertainty.*

To a count against the acceptor of a bill of exchange, the defendants pleaded that they accepted the bill payable at their bankers', that, when the bill became due, it was duly presented at the bankers', who then honoured and paid the same according to the usage and custom of merchants in that behalf; and further, that the bankers afterwards lost the bill, and it came to the plaintiffs' hands without value or consideration:—Held, that the first allegation was an informal allegation of payment, and bad for uncertainty; and that the plea was also bad for duplicity. Deacon v. Stodhart, 763.

VI. *What Pleas are issuable.*

Bankruptcy of a sole plaintiff after the cause of action accrued and before the commencement of the suit, is an issuable plea. Willis v. Allen, 474.

And see CONTRACT, 6, 7—NEW ASSIGNMENT.

PRACTICE.

I. *Process.*

same day, but returnable ten days later:—The court ordered it to be set aside. Ib.

II. *Pleading several Matters.*

In trespass for a false imprisonment of the plaintiff on a charge of having committed a certain offence, to wit, a felony—The court allowed the defendant to plead—1. that the plaintiff had forged the acceptance to a certain bill of exchange—2. that he had issued the bill, knowing the acceptance to be forged—3. that the defendant had reasonable cause to believe that the plaintiff had forged the acceptance—4. that the plaintiff had obtained money on the bill by false pretences. Currie v. Almond, 172.

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IX. *Postponing Trial.*

The court cannot, without the consent

of the parties, postpone the trial of issues in fact, until the decision of a court of error is obtained upon a judgment pronounced upon issues in law on the same record. Beckham v. Knight, 346; Carden v. The General Cemetery Company, 348.

X. *Entering Verdict distributivè.*

In trespass for breaking and entering the plaintiff's close, and prostrating his gates and gate-posts, the defendant pleaded (amongst other pleas) a right of way on foot and with horses, cattle, carts, waggons, and other carriages, for himself and his servants, at all times of the year, at his and their free will and pleasure, for the more convenient occupation of the defendant's close called King's Haugh Wood. At the trial, the jury found that the defendant had a limited right only for the purpose of conveying timber from the road to the highway:—Held, that the rules of Hilary Term, 4 Will. 4, V. ss. 4, 5, 6, did not authorize the court to enter the verdict distributivè for the defendant on this plea. Higham v. Rabett, 827.

And see RELEASE.

PRESENT DEMISE.

See ASSIGNMENT.

PRISONER.

Charging in Execution.

The defendant being illegally in the custody of the sheriff, was detained at the suit of the plaintiff: the court ordered him to be discharged from that detainer; but the rule for this purpose was not served upon the Warden of the Fleet, whither he had been removed in execution at the plaintiff's suit. The defendant being in legal custody at the suit of another party, the plaintiff in this action lodged a fresh detainer against him, and brought him up to be charged in execution thereon. The Warden's return to the habeas corpus shewing the defendant to be already in execution at the plaintiff's suit:—Held, that he could not be charged again without first being discharged from the former illegal execution. Pearson v. Yewens, 701.

PUBLIC HOUSE LICENCE.

See LICENCE.

PUIS DARREIN CONTINUA

See PRACTICE III.

QUARE IMPEDIT.

I. *Right of Presentation where one Co-Patrons a Roman Catholi*

The right of presentation given Universities by the statutes 3 Jac. 1 ss. 18, 19, 20, 1 W. & M. c. 26, s. 12 Anne, st. 2, c. 14, s. 1, arises o the case of a *sole* patron or *all* of co-patrons professing the Roman C religion. Where two are jointly se an advowson, the one being a Rom tholic, the other a Protestant, th right of presentation is in the Edwards v. The Bishop of Exeter,

II. *Costs in.*

Quare Impedit is within the 3 & 4 c. 42, s. 34; but that clause is ridden by the proviso in the 5 & 6 V c. 39, which enables the court, judge who tries the cause, to certify empt the defendants from costs. wards v. The Bishop of Exeter, 67

Tenants in common of an advo one being a protestant, the other a R Catholic, the church being vacan former presented alone; the ordina fused to admit the clerk so presente the ground that the *sole* right of pr ation was not in the protestant co-p and, after a lapse, collated:—Held this was a proper case for a certifica der the 5 & 6 Will. 4, c. 39, to exem defendants from costs. Ib.

And *semble* (dubitante Maule, J. the ordinary was, under the circumst an "ecclesiastical patron," withi meaning of the proviso in the last tioned statute. Ib.

QUIET ENJOYMENT.

See COVENANT, 1.

RECOVERY.

A common recovery suffered by tenant for life, though unaccompani any feoffment or fine, operates a bar contingent remainders depending up particular estate, notwithstanding t tute 14 Eliz. c. 8. Doe d. Davis v acre, 807.

RE-ENTRY.

See MINES.

RELEASE.

To induce the court, on a summary application, to set aside a plea of a release by one of two co-plaintiffs, it must be clearly shewn that the release has been obtained by fraud between the releasor and the defendant. Crook v. Stephens, 848.

REMAINDER.

See DEVISE, 2, 3.

REQUESTS, COURT OF.

See COURT OF REQUESTS.

RESIDENCE.

Description of defendant's residence in writ of summons—*See* PRACTICE, I. 1, 2.

RIGHT OF WAY.

1. By an inclosure act it was enacted that all ways over a certain field called West Field allotted to B., should be extinguished from the time of the making and completion of a new road as therein directed; with a proviso that nothing in the act should extend or be construed to extend to deprive A., his heirs or assigns, or his or their agents &c., of the right of ingress, egress, and regress to and from a watercourse, for the purpose of re-building, repairing, opening, or shutting the sluices thereon, or to cleanse the same:—Held, that this reserved to A. his right of way unimpaired over West Field for the purposes in the act mentioned. Adeane v. Mortlock, 189.

2. Held also, that a tenant of A. who occupied meadow land irrigated by means of the sluices, was a competent witness in an action by A. for an obstruction of this right of way. Ib.

RIGHT OF WAY.

See TRESPASS, II.

RIGHT, WRIT OF.

See DEVISE, 1—EVIDENCE, III—FINE I.

RULE TO COMPUTE.

See PRACTICE, VI.

SALE.

See CONTRACT—LICENSE—VENDOR AND PURCHASER.

SECURITY FOR COSTS.

See COSTS, XIV.

SEPARATION, DEED OF.

See DEED OF SEPARATION.

SET-OFF.

1. Where a verdict passes against a defendant upon a plea of set-off, he is estopped from setting up the same demand in a fresh action. Eastmure v. Laws, 461.

2. On receiving the debt and costs, the plaintiff's attorney refused to allow certain interlocutory costs due to the defendant to be set off. Without making any formal demand of these costs, the defendant obtained a rule calling upon the plaintiff or his attorney to pay them:—The court made the rule absolute *without costs* Abernethy v. Paton, 122.

3. In trespass against two defendants, the plaintiff obtained a verdict against one, and the other was acquitted. The court made absolute *without costs* a rule for setting off the costs of the successful defendant against the damages and costs awarded for the plaintiff against the other defendant—disregarding the attorney's lien.

And see ARBITRATION, II. 2—BANKRUPT, II.

SHERIFF.

See ARREST—ESCAPE.

SIERRA LEONE.

See FOREIGN JUDGMENT.

SPEAKER'S CERTIFICATE.

See PARLIAMENT.

SPECIAL BAILIFF.

See ESCAPE.

SPECIAL DAMAGE.

The plaintiff purchased a horse of the defendant, with a warranty of soundness, and sold it with a like warranty to J. S.; some months afterwards J. S. returned

the horse, finding it to have been unsound at the time of the sale; the plaintiff declining to take it back, J. S. brought an action on the warranty; the plaintiff gave the defendant notice that the horse was returned to him as unsound, and an action brought; the defendant disregarding this notice, the plaintiff defended the action brought against him by J. S., and failed. In an action against the defendant on his warranty—the jury finding that the plaintiff might, by a reasonable examination of the horse, have discovered that it was unsound at the time he sold it to J. S.:—Held, that the plaintiff was not entitled to recover as special damage the costs incurred by him in the defence of the former action, such defence being under the circumstances rash and improvident. Wrightup v. Chamberlain, 598.

SPECIFICATION.
See PATENT.

SPINNING MACHINE.
See PATENT.

STAMP.

1. Two of the personal representatives of a deceased tenant from year to year signed a memorandum to the following effect:—"We, the undersigned executrixes, &c, do hereby renounce and disclaim, and also surrender and yield up, unto the churchwardens and overseers for the time being of the parish of St. H., all right, title, interest, use, trust, term and terms of years whatsoever, and possession, of and in all that messuage or tenement and premises, called B., situate in the said parish of St. H., formerly in the possession of J. C. [the testator] as tenant thereof to the said parish of St. H.:"—Held, that this was a surrender, and consequently was not admissible in evidence without a stamp. Doe d. Wyatt v. Stagg, 690.

2. The defendant having distrained the goods of the plaintiff for arrears of rent, the latter signed the following undertaking:—"In consideration of Mr. C. giving me the household furniture distrained for rent due to him (but the furniture only), I undertake to give him possession of the premises held by my late husband, on or before one week from this date:"—Held, that the memorandum did not require a stamp, it not appearing affirmative it related to a matter amounting in to 20*l*. Feltham v. Cartwright, 69

STATUTE OF FRAUDS.

I. *Undertaking for the Debt of a Person.*

1. One W. being indebted to the tiff, who was pressing for a settl the defendant, W.'s attorney, se plaintiff W.'s acceptance at two m date, inclosed in a letter in which desired the plaintiff to put his name bill as drawer, and told him he safely pay it away. Upon being as indorse the bill, the defendant wr the back of the letter in which he h closed the bill—"I never put my n bills; but I will see it paid for W Held, that this was a personal und ing, upon sufficient consideration, W.'s debt. Emmett v. Kearns, 68

2. Held, that the following mem dum signed by the defendant, was cient to charge him within the sta frauds:—"I hereby guarantee t the payment of the proceeds of the you have consigned to my brother of Sydney, and also any future ship you may make to him, in considera the sum of 2*s*. 6*d*. *paid to me*, w hereby acknowledge to have receiv it being the necessary intendment th consideration was *paid by the pl* Dutchman v. Tooth, 710.

II. *Memorandum of Sale.*

1. A contract for the sale of good in the presence and at the desire buyer, written and signed by the traveller in a book belonging to t mer, as follows:—"Of North & C Mats Maur^{s}. Cash two months. J Dyson:"—Held, that this was not cient note or memorandum of the b to satisfy the 17th section of the sta frauds—Dyson not appearing to thorized to sign it *as agent for the* Graham v. Musson, 769.

2. The authority of an agent t such a contract need not be in writin

STATUTE OF LIMITATIO
See LIMITATION OF ACTIONS.

STOPPAGE IN TRANSITU
See VENDOR AND PURCHASER, I

SUGGESTION.

I. *For Double Costs under 7 Jac, 1, c. 5* —*See* COSTS, VII.

II. *Under the Blackheath Court of Requests Acts, 6 & 7 Will. 4, c. cxx., and 1 & 2 Vict. c. lxxxix*—*See* COSTS, VI.

SURETY.

See—GUARANTIE.

SURRENDER.

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TENANTS IN COMMON.

See ACCOUNT—QUARE IMPEDIT, 1.

TENANT FOR LIFE.

A common recovery suffered by a bare tenant for life, though unaccompanied by any feoffment or fine, operates a bar of the contingent remainders depending upon the particular estate, notwithstanding the statute 14 Eliz. c. 8. Doe d. Davis v. Gatacre, 807.

TRANSITUS.

See VENDOR AND PURCHASER, II.

TRESPASS.

I. *Pleading several Matters.*

In trespass for a false imprisonment of the plaintiff on a charge of having committed a certain offence, to wit, a felony—The court allowed the defendant to plead—1. that the plaintiff had forged the acceptance to a certain bill of exchange—2. that he had issued the bill, knowing the acceptance to be forged—3. that the defendant had reasonable cause to believe that the plaintiff had forged the acceptance—4. that the plaintiff had obtained money on the bill by false pretences. Currie v. Almond, 172.

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And see LEAVE AND LICENCE—SET-OFF.

TROVER.

A declaration in trover by the assignee of an insolvent debtor, charging a conversion in the time of the assignee, was allowed to be amended at the trial by alleging a conversion before the insolvency—the real question to be tried not being thereby varied. Norcutt v. Mottram, 176.

And see VENDOR AND PURCHASER.

USURY.

A loan upon usurious interest secured by the deposit of a lease and a warrant of attorney, is not brought within the protection of the 1 Vict. c. 80, by the addition of a promissory note as a further security. Berrington v. Collis, 302.

VENDOR AND PURCHASER.

I. *False Representation.*

A contract for the sale of fixtures and fittings of a public-house:—Held, to be avoided by a false representation by the vendor as to the amount of business attached to the house, though the agree-

ment expressly excluded *goodwill*. Hutchinson v. Morley, 341.

II. *Right to stop Goods in Transitu.*

In October, 1836, one C., of Newcastle, as agent for M. & Co. of London, contracted with the plaintiffs for the purchase of a quantity of lead to be paid for by bill at six months from time of delivery. The lead remained in the plaintiff's possession until the 5th January, when the plaintiff gave C. a delivery order for it. On the 9th, it was accordingly delivered from the plaintiff's premises to a keelman in the employ of the owners of the Esk, a general trader between Newcastle and London, for the purpose of being put on board that vessel, and was by him put on board, the lighterage being paid by C. on account of M. & Co. An invoice of the lead was delivered to C., and C. transmitted to M. & Co. a bill of lading for it signed by the owners for the Captain of the Esk. The Esk arrived in London on the 21st January. The defendants, by M. & Co.'s orders, undertook the delivery of the lead. M. & Co. stopped payment on the 21st. On the 24th the lead was demanded on behalf of M. & Co., the freight being tendered: but both the captain of the Esk and the defendants refused to deliver it. On the 28th, the lead being in a lighter, and under the control of the defendants, it was stopped on behalf of the plaintiff: —Held, that the transitus was not ended at the time of the stoppage. Jackson v. Nichol, 577.

2. The plaintiffs purchased of the defendants 600 quarters of wheat at a certain price, payment to be made by a bankers' draft on London at two months, to be remitted by the plaintiffs to the defendants on receipt by the former of the invoice and bill of lading. The wheat was shipped for the account and risk of the plaintiffs, and the invoice and bill of lading sent to and received by the plaintiffs. The plaintiffs not remitting the draft pursuant to the terms of the contract, the defendants stopped the wheat in transitu, and immediately re-sold it:—Held, that the plaintiffs had not such a right of possession as to entitle them to maintain trover. Wilmshurst v. Bowker, 561.

3. Quære, whether a vendor of goods has a right to stop them in transitu, where the vendees are neither bankrupt nor insolvent. Ib.

VENUE.

Changing.

1. A motion to change the venu not be made until after issue j Griffin v. Walker, 846.

2. The court refused to chang venue from London to Liverpool, action for running down a vessel, u suggestion that the defendant inten call as witnesses (experts) persons i cial situations in Liverpool, whos sence thence might be detrimental public service. Bucknell v. Phillipp

3. The court refused to change t nue from Cambridge to Norfolk, up affidavit stating that the plaintiffs gentlemen of property and influen Cambridgeshire, that one of them member for the county, and that a portion of the property in the count liable to the rates imposed by the B Level Corporation—the action brought for the breach of a contract with the corporation for works o level. Thornton v. Jenyns, 593.

4. The court refused to change the from London to Yorkshire, on the g that the expense of bringing his wit (sixty in number) from Yorkshire to don, would be ruinous to the defend the affidavit condescending upon n specific. Thornhill v. Oastler, 272.

5. The court refused to change t nue from Radnor to Hereford, o ground that the number of special men in the former county does not e twenty-nine. Doe d. Williams v. I 143.

6. In an action for slander imput the mayor of Maidstone perjury in h amination before an election comm the venue having at the instance defendant been changed from Lond Maidstone—The court (upon terms rected it to be brought back, it sworn, that, by reason of the great pc excitement at and in the neighbourh Maidstone, and the manner in whi matter had been handled in the local papers, it was impossible that the pl could have an impartial trial at Maid Pybus v. Scudamore, 124.

VICE ADMIRALTY COUR

See FOREIGN JUDGMENT.

WARRANTY.

Of the Soundness of a Horse.

The plaintiff purchased a horse of the defendant, with a warranty of soundness, and sold it with a like warranty to J. S.; some months afterwards J. S. returned the horse, finding it to have been unsound at the time of the sale; the plaintiff declining to take it back, J. S. brought an action on the warranty; the plaintiff gave the defendant notice that the horse was returned to him as unsound, and an action brought; the defendant disregarding this notice, the plaintiff defended the action brought against him by J. S., and failed. In an action against the defendant on his warranty—the jury finding that the plaintiff might, by a reasonable examination of the horse, have discovered that it was unsound at the time he sold it to J. S.:—Held, that the plaintiff was not entitled to recover as special damage the costs incurred by him in the defence of the former action, such defence being under the circumstances rash and improvident. Wrightup v. Chamberlain, 598.

WAY, RIGHT OF.

See RIGHT OF WAY—TRESPASS, II.

WELSH PEDIGREE.

See PEDIGREE.

WHARFINGER.

1. The plaintiff was a carrier and proprietor of hoys sailing from a wharf belonging to one S. and called "Kent Wharf." The defendant, a wharfinger, became tenant to S. of a part of the wharf. In an action on the case against the defendant for fraudulently representing that the plaintiff's hoys sailed from *his* wharf, whereby the plaintiff was deprived of freights, a conversation between S. and the defendant, which took place at the time of the commencement of the defendant's tenancy, and in which the defendant was informed by S. that he did not let him the name of the wharf, was received in evidence (although the terms of the tenancy were contained in *a lease*) for the purpose of shewing knowledge on the part of the defendant that S. had intended to retain the exclusive use of the name of "Kent Wharf," for that portion of the wharf that he himself continued to occupy:—Held, that, for this purpose and to this extent it was properly received. Hope v. West, 876.

2. And held that it was no ground for arresting the judgment, that the declaration contained no averment that the goods were left at the defendant's wharf with express instructions to forward them by the plaintiff's hoy, nor any allegation of a specific fraud or false pretence, nor any averment of loss of freight sustained by the plaintiff. Ib.

WILL.

See DEVISE.

WORK AND LABOUR.

See PLEADING, III, 1, 2.

WRIT OF RIGHT.

See DEVISE, 1—EVIDENCE, III—FINE, I.

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